

Supreme Court of the United States

OCTOBER TERM, 1978

No. 72-6476

CYNTHIA HAGANS, for herself and her two infant children, KIMBERLY and KOREY; BERTHA GRISSETT, for herself and her five infant children, DEBORAH, ANGELO, WILLIAM, LINDA and CYNTHIA; KATHRYN ZAV-
ERZENGE, for herself and her infant child, DANA LYNN; KAREN HORNECK, for herself and her infant child TODD, and her intrauterine child yet unnamed; EURLEEN CARSON, for herself and her two infant children, TIMOTHY and CALVIN; BARBARA SIEMILLER, ELIZABETH ELY and BARBARA LYNCH, as individuals and on behalf of all other persons similarly situated,
Plaintiffs-Appellants,

—against—

ABE LAVINE, Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, as Commissioner of the Nassau County Department of Social Services,

Defendants-Appellees

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

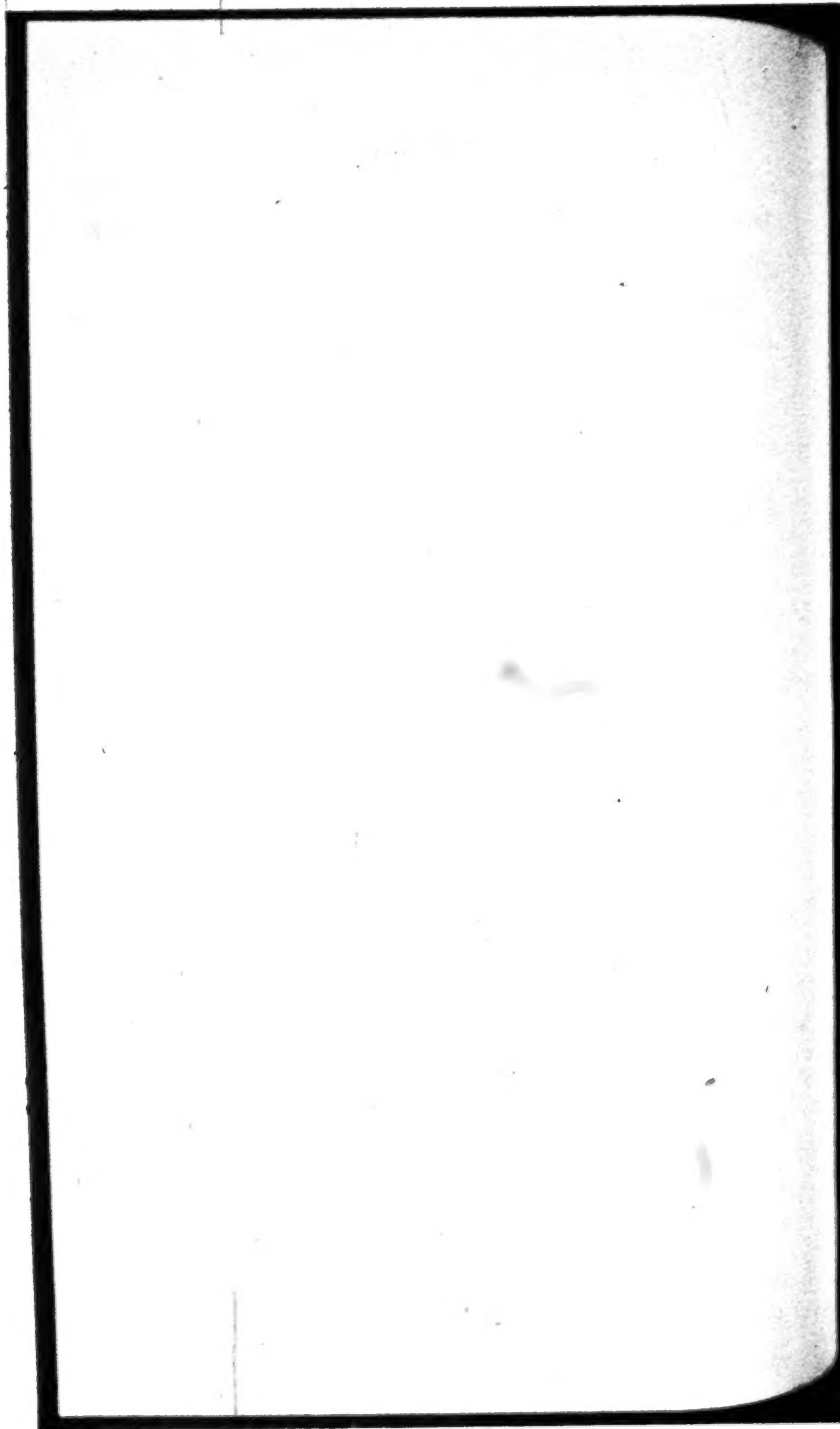
INDEX

	Page
Chronological List of Relevant Docket Entries	1
Complaint	4
Order to Show Cause—Re: Preliminary and Permanent Injunctions and Convening of a Statutory Three Judge Court	17

	Page
Affidavit of BURR C. HOLLISTER in Support of Motion for Convening of Three Judge Court, Temporary Restraining Order and Preliminary Injunction	20
Exhibit A—	
Letter from Elmer W. Smith, dated December 29, 1972 to GEORGE K. WYMAN	26
Letter from Elmer W. Smith to GEORGE K. WYMAN	27
Answer of Defendant GEORGE K. WYMAN	28
Temporary Restraining Order dated February 18, 1972, Mishler, Ch. J.	30
Stipulation of Facts dated February 28, 1972	32
Trial Transcript of February 28, 1972. Testimony of Arthur J. Doring and Joseph Barry	39
Memorandum of Decision dated March 3, 1972, Mishler, Ch. J.	66
Memorandum of Decision on Settlement of Judgment, dated March 14, 1972, Mishler, Ch. J.	72
Order and Judgment dated March 14, 1972, Mishler, Ch. J. Re: Class Action, granting Permanent Injunction	75
Order of the Court of Appeals dated March 21, 1972 staying District Court Order. Hays, Mansfield, Mulligan, C.C.J.....	77
Opinion and Order of the Court of Appeals for the Second Circuit, dated June 5, 1972	78
Affidavit of BARBARA SIEMILLER	85
Letter from County of Westchester Department of Social Services to BARBARA SIEMILLER, dated May 17, 1972..	88
Notice of Intent to Reduce Public Assistance dated May 17, 1972	89
Letter of BARBARA SIEMILLER, dated June 7, 1972	91
Decision After Fair Hearing, Re: BARBARA SIEMILLER, dated July 21, 1972	92
Affidavit of ELIZABETH ELY	94
Decision After Fair Hearing, Re: ELIZABETH ELY, dated October 6, 1972	96
Affidavit of BARBARA LYNCH	98
Notice of Advancement of Rent to Forestall Eviction	100

INDEX

	Page
Intervenors' Complaint	101
Memorandum of Decision and Order, Mishler, Ch.J., dated October 19, 1972, Granting Permanent Injunction and Reimbursement of Sums Recouped	112
Order of the Court of Appeals for the Second Circuit dated October 26, 1972, staying District Court Order. Moore, Hays, Mulligan	118
Opinion and Order of the Court of Appeals for the Second Circuit, dated January 3, 1973	120
Order of the Supreme Court of the United States Granting Motion for Leave to Proceed in Forma Pauperis and Granting Petition for Writ of Certiorari	125



CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
February 10, 1972	Plaintiffs' Complaint filed in United States District Court for the Eastern District of New York and Summons Issued
February 10, 1972	Order granting Plaintiffs Leave to Proceed in Forma Pauperis. Constantino, J.
February 17, 1972	Order to Show Cause, Ordered that Defendants Show Cause in Courtroom No. 5 on February 18, 1972 at 10:00 A.M. why a Temporary Restraining Order should not issue pending Plaintiffs' Motion for a Preliminary and Permanent Injunction. Mishler, Ch.J. filed.
February 18, 1972	Hearing on Motion for Preliminary Injunction, Temporary Restraining Order, Three-judge court, etc. Motion argued. Mishler, Ch. J. Temporary Restraining Order granted. Case set down for trial February 28, 1972.
February 18, 1972	Affidavit of JAMES N. GALLAGHER in Opposition to Motion.
February 18, 1972	Memorandum of Defendant WYMAN in Opposition to Plaintiffs' Motion.
February 18, 1972	Temporary Restraining Order, Mishler, Ch. J.
February 18, 1972	Affidavit of Service of Order to Show Cause, Summons and Complaint filed.
February 28, 1972	Trial on Statutory Claim before Mishler, Ch. J. Decision Reserved.

DATE	PROCEEDINGS
February 29, 1972	Plaintiffs' Memorandum of Law in Support of Preliminary Injunction.
February 29, 1972	Defendant WYMAN's Memorandum of Law.
March 3, 1972	Memorandum Decision. The Court declares that 18 N.Y.C.R.R. § 352.7(g) (6) contravenes the Social Security Act and regulations promulgated thereunder and a Permanent Injunction may issue.
March 10, 1972	Answer of Defendant GEORGE K. WYMAN filed.
March 15, 1972	Judgment entered March 14, 1972, filed. Ordered that action properly maintainable as a class action; that § 352.7(g) (6) of Title 18 of the N.Y.C.R.R. is declared in violation of the Social Security Act and Defendants permanently enjoined from enforcement or implementation of said regulation. Mishler, Ch. J.
March 15, 1972	Defendant GEORGE K. WYMAN'S Notice of Appeal filed.
March 15, 1972	Stenographic Transcript filed.
April 7, 1972	Appeal argued. Clark, Associate Justice, Lumbard, Senior C. J., Tyler, J.
June 5, 1972	Opinion and Order of the Court of Appeals for the Second Circuit. Order of the District Court vacated and the action is remanded for further proceedings in accordance with opinion of Court.
October 2, 1972	Plaintiffs' Motion for Leave to Permit Additional Parties to Intervene filed.

DATE	PROCEEDINGS
October 6, 1972	Plaintiffs' Motion for Leave to Intervene granted [on consent]. Hearing Re: Remand—decision reserved, Mishler, Ch. J.
October 19, 1972	Memorandum Decision declaring that 18 N.Y.C.R.R. § 352.7(g) (7) contravenes the Social Security Act and clerk directed to enter judgment forthwith enjoining defendants from attempting to recoup duplicate payment from AFDC benefits as mandated by § 352.7(g) (7). Mishler, Ch. J.
October 19, 1972	Judgment filed. Ordered, Adjudged and Decreed that 18 N.Y.C.R.R. § 352.7(g) (7) is declared to be null, void and of no effect and defendants are restrained and enjoined from enforcing and implementing said regulation.
October 20, 1972	Defendant WYMAN's Notice of Appeal filed.
November 3, 1972	Appeal argued. Friendly, Ch. J. Waterman, J., Hayes, J.
January 3, 1973	Opinion and Judgment of the Court of Appeals for the Second Circuit. Case remanded with instructions to dismiss.
March 31, 1973	Petition for Certiorari filed.
June 11, 1973	Certiorari and Leave to Proceed in Forma Pauperis granted.

**IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

[Title Omitted]

72 C 182

COMPLAINT—Filed February 10, 1972

I

Plaintiffs, on behalf of themselves and all other persons similarly situated, seek a declaration that § 352.7 (g) (6) of Title 18 of the New York Code of Rules and Regulations as promulgated on August 6, 1971, effective August 6, 1971, is in violation of the Social Security Act; 42 USC § 601-610, the regulations promulgated thereunder, 45 CFR § 233.20, and of the Equal Protection Clause to the Fourteenth Amendment to the United States Constitution.

Plaintiffs seek injunctive relief from any and all action taken under the aforesaid regulation to reduce or suspend their grants and those of other recipients of public assistance who are similarly situated.

II

PRELIMINARY STATEMENT

On August 6, 1971, the New York State Department of Social Services promulgated a new statewide regulation, § 352.7 (g) (6) which for the first time provided that any "advance allowances" issued to prevent eviction for non-payment of rent for which a grant had already been issued shall be recouped and deducted in equal amounts from the regular family assistance grant during the subsequent six months. This regulation became effective immediately on August 6, 1971 and has been applied throughout New York State to drastically reduce, over a six month period, the monthly grants for basic needs of families who have been threatened with eviction.

The said regulation is in direct conflict with the Social Security Act's requirement in the federally aided programs of Aid to Dependent Children that aid be furnished with reasonable promptness to all eligible individuals. Specifically, said regulation inflicts a punishment upon dependent children by a drastic six month reduction in their food, clothing and basic necessity allowance for acts or events beyond their control. Such a reduction is wholly inconsistent with the Social Security Act's requirement that eligibility determinations be made on the basis of need less available income and resources within the statutory assistance levels established in each state, and is a further illegal circumvention of the Social Security Act's prohibition on assumed income. The recipients who are issued a shelter grant to prevent eviction are equally needy in subsequent months but said Regulation automatically recoups the full amount regardless of how little of the subsequent basic grants remains to satisfy the family's needs.

The said Regulation further violates the Equal Protection and Due Process Clauses to the Fourteenth Amendment by discriminating irrationally and invidiously between different classes of recipients, and by imposing automatic reductions of basic needs grants without any standards. The basic subsistence grant for families who have received duplicate rent payment to prevent eviction is arbitrarily reduced or suspended for six months while all other recipients with identical basic needs receive their full monthly allotments. No basis, consistent with the purposes of the Social Security Act and relative to the existence or extent of need, exists for this discrimination. All families with defendant children are deemed by statute to be equally needy. The family that has prevented eviction is not the less needy of the essentials of living in subsequent months; yet, only the victims of threatened eviction are subjected to this drastic curtailment of subsistence benefits in violation of their right to Equal Protection of the Laws.

Further, 18 NYCRR § 352.7(g) (6) requires the automatic reduction of basic needs grant for six months without any relation to acts, consent or circumstances of each

family affected beyond having had eviction prevented by payment of rent for which a grant had already been issued. No determination is made as to the reason for or fault regarding nonpayment of rent. All families are lumped together regardless of the reason for the eviction. The lack of standards for said deduction violates the automatic reduction of basic needs grants for six months without any relation to the Fourteenth Amendment to the United States Constitution.

The harm inflicted by the automatic recoupment mandated by 18 NYCRR § 352.7(g)(6) is immediate, irreparable and devastating to families suddenly left for half a year with only a fraction of the funds needed for food, clothing, and other basic necessities.

III

JURISDICTION

The jurisdiction of this Court is based upon 28 U.S.C. § 1343 in conjunction with 28 U.S.C. § 2201 and § 2202, 42 U.S.C. § 1983 and the Fourteenth Amendment to the United States Constitution.

IV

THREE JUDGE COURT

1) Plaintiffs seek preliminary and permanent injunctive relief from the enforcement and operation of 18 NYCRR § 352.7(g)(6) on the grounds of the unconstitutionality of such statewide regulation.

2) Pursuant to 28 U.S.C. § 2281, a three judge statutory court should be convened to hear and determine plaintiffs' claim.

V

STATEMENT OF CLAIM

1) New York operates and administers its Aid to Dependent Children program pursuant to the requirements of the Social Security Act, 42 U.S.C. § 601 *et seq.* for

which it receives billions of dollars annually as federal reimbursement. Pursuant to required State Plan, and specifically 42 U.S.C. § 602(a)(23), New York has enacted in § 131-a of the Social Services Law a statewide standard of need for all families and a concomitant statewide schedule of monthly basic needs grants and allowances to be issued to persons determined to be needy. 18 NYCRR § 352.4. Such grants and allowances are designed to meet subsistence needs for food, clothing, furniture, household supplies, transportation and other personal expenses, but exclusive of shelter.

2) Shelter needs are met by a separately computed amount as determined by rent schedules promulgated in each local social services district pursuant to 18 NYCRR § 352.3. In all cases the rent allowance is issued in the amount of shelter expense actually paid, up to the maximums set forth in such schedules.

3) Prior to August, 1971, rent payments made to forestall eviction of families were issued as emergency assistance pursuant to § 350-j of the Social Services Law and Part 372 of the New York Code of Rules and Regulations, as required by 42 U.S.C. § 606(e)(1). Emergency assistance when issued was designed to alleviate a present crisis and no recoupment of emergency funds was required.

4) On August 6, 1971, 18 NYCRR § 352.7(g)(6) was promulgated and made effective, providing that:

For a recipient of public assistance who is being evicted for nonpayment of rent for which a grant has been previously issued, and advance allowance may be provided to prevent such eviction or rehouse the family; and such advance shall be deducted from subsequent grants in equal amounts over not more than the next six months. When there is a rent advance for more than one month, or more than one rent advance in a 12 month period, subsequent grants for rent shall be provided as restricted payments in accordance with Part 381 of this Title.

5) Any element of choice or election by the recipients affected under said regulation is illusory and coerced.

Families are told by social service workers that the only way to prevent eviction into the streets and possible motels, a placement with its disruptive, devastating effects upon children, is to "consent" to accepting the "advance" to the subsequent six month curtailment of basic needs. Often consent is not even sought.

6) The "advance" of rent results in no further available income or resources to the recipient family since it must be paid in its entirety to the landlord in to effect its purpose of preventing eviction. No standard is used to determine the circumstances responsible for non-payment of rent leading to hearing.

7) Families in receipt of Aid to Dependent Children, are deemed by § 131-a of the Social Services Law to have specific basic needs for food, clothing, household supplies, transportation, utilities, and other essential items and the standard of need and level of payments available to meet those needs are set uniformly for all families. Under the Social Security Act the level of assistance actually granted cannot be reduced below those uniform levels unless there is available income or resources to make up the reduction deficiency. Yet, the regulation challenged herein results in drastic reductions of assistance for six months and leaves families with a small fraction of the funds needed to survive.

8) Said reduction lowers otherwise eligible families far below their correct levels of entitlements and result in denial of eligibility to persons whose income or other resources are just below welfare standards and are now, by application of this reduced eligibility standard, above such standards.

VI

PLAINTIFFS

1(a) Plaintiffs are all citizens of the United States and reside in New York State, County of Nassau. Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on their own behalf and on behalf of all individuals and families similarly aggrieved by the implementation of 18 NYCRR § 352.7

(g) (6) in violation of the Social Security Act, federal regulations and United States Constitution.

Plaintiffs are members of a class of recipients of public assistance in the Aid to Dependent Children category residing in New York State whose grants have been reduced to prevent eviction in violation of the aforesaid provisions of law.

(b) Plaintiffs bring this action as a class action because the questions of fact and law are common to the plaintiffs and the class they represent, the members of the class are so numerous as to make joinder of parties impracticable, the claims of the plaintiffs are typical of the claims of all members of the class, the plaintiffs fairly and adequately represent the claims of all the members of the class, the defendant is acting on grounds generally applicable to the entire class, the questions of law and fact common to the class predominate over any questions affecting individual members, and class action will best provide for a fair and efficient adjudication of this controversy.

2. The named plaintiffs have had their basic needs grants drastically reduced to levels ranging from nine to seventy seven percent of need:

(a) Plaintiff HAGANS and her two infant children have basic needs of \$161 but will receive only \$17 or 9% of such needs in February, 1972. She gradually fell behind in rent payments during 1971 because her then \$165 rent allowance was \$35 less than her actual rent of \$200. The rent "advance" is being deducted in one month because her new housing is in Suffolk County and there will be no opportunity for recoupment after February, 1972, since she will then be receiving assistance from Suffolk County.

(b) Plaintiff GRISSETT and her five children had stolen their full August 1, 1971 public assistance check including the August rent of \$250. The theft is undisputed. When plaintiff GRISSETT was sued for non-payment of that rent in December, 1971, the local agency summarily issued the rent to prevent eviction and automatically deducted in advance the \$250, pro-rated over six months, or \$41.33 from each monthly grant.

(c) Plaintiff ZAVESENCE and her two infant children, effective February 1, 1972, are suffering a reduction of \$83.38 from their usual basic needs grant of \$161, leaving only \$77.65 for the family's basic needs, or 40% of the statutory need level of \$161. The nonpayment of rent and eviction resulted from plaintiff's use of funds to search for alternate housing.

(d) Plaintiff HORNECK is eight months pregnant and has a year old infant son. She is threatened with reduction of her basic needs grant by \$33 per month, effective February 1, 1972 having only \$88 to meet basic needs of \$134. Living in substandard housing, plaintiff HORNECK fell behind in rent when searching for other housing.

(e) Plaintiff CARSON and her two infant children were reduced by \$83.33 each month from January 1, 1972 and is left with only \$76.65 or 40% of their basic needs to live on. A local agency error resulted in nonpayment of rent when the agency told plaintiff CARSON the rent would be paid directly to the landlord, but failed to do so.

3. Plaintiffs were coerced into accepting, or not notified or consulted in regard to, the recoupments. No income or resources were available to them to defray the impact of the lost basic needs grant. No determinations whatever were made as to the circumstances responsible for the nonpayment of rent.

VII

DEFENDANTS

1. The defendant, BARRY VAN LARE, as Acting Commissioner of the New York State Department of Social Services has primary responsibility for the administration of that Department in compliance with state and federal law. New York Social Services Law § 34.

2. The defendant, JAMES M. SHUART, as Commissioner of the Nassau County Department of Social Services is primarily responsible for the administration of that Department with state and federal law. New York Social Services Law § 62.

VIII

AS A FIRST CAUSE OF ACTION PLAINTIFFS ALLEGE

1) 18 NYCRR § 352.7(g)(6) violates the Social Security Act of 1935 and the regulations promulgated thereunder in that it mandates a reduction in assistance benefits where no additional income or resources are available to make up for the reduction.

2) 42 U.S.C. § 602(a)(10) provides that New York by accepting federal funds is under a duty, "that Aid to Dependent Children shall be furnished with reasonable promptness to all eligible individuals". 42 U.S.C. § 602(a)(7) provides that a "State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming and to families with dependent children".

3) 45 C.F.R. § 233.20(a) provides in pertinent part:

"A State Plan for OOA, AFDC, AB, APTD, or AABD must, as specified below:

* * * *

(3)(ii) Provide that, in establishing financial eligibility and the amount of the assistance payment:

* * * *

(c) only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered; (d) current payments of assistance will not be reduced because of prior overpayment unless the recipient has income or resources currently available in the amount by which the agency proposes to reduce payment;

..."

* * * *

(viii) Provide that payment will be based on the determination of the amount of assistance needed, . . ."

4) HEW, *Handbook of Public Assistance*, Part IV § 3131 provides that: "The State plan must provide that loans made under conditions that preclude their use for meeting current living costs and that are held and used in accordance with such conditions shall not be considered available for such needs and that the same so held and used shall not be taken into account in determining the assistance payment.

5) The United States Department of Health Education and Welfare has not approved 18 NYCRR § 352.7 (g) (6).

6) Under 18 NYCRR § 352.7(g) (6) defendants violate the aforesaid provisions of law by reducing the monthly grants of recipients of public assistance who have received a grant to prevent eviction for nonpayment of rent for which a grant had been previously issued, when no income or resources are available to compensate for or to meet the residual need caused by, that reduction.

IX

AS AND FOR A SECOND CAUSE OF ACTION

1) 18 NYCRR § 352.7(g) (6) provides for the meeting of emergency housing needs caused by threat of eviction for nonpayment by merely spreading the "emergency" over a subsequent six month period through drastic deprivation of basic needs. Immediate eviction is avoided, but later deprivation is inflicted.

2) 42 U.S.C. § 606(e) provides for emergency assistance for families with dependent children, where a "child is without available resources . . . to provide living arrangements in a home for such child".

3) 45 C.F.R. § 233.120 provides that, apart from the regular need for public assistance, "emergency assistance will be given forthwith."

4) § 350-j of the Social Services Law provides that emergency assistance shall be provided "for children who are without available resources and when such assistance is necessary to avoid destitution or to provide them with living arrangements in a home . . ."

5) None of the aforesaid provisions for Emergency Assistance permits or requires any offset or recoupment of the assistance issued to meet the emergency.

6) 18 NYCRR § 352.7(g) (6) in effectively penalizing families with children who are in emergency circumstances because of threatened eviction for nonpayment, undercuts, circumvents and is entirely inconsistent with the Social Security Act's requirement to provide Emergency Assistance.

X

AS AND FOR A THIRD CAUSE OF ACTION

1) 18 NYCRR § 352.7(g) (6) in requiring the reduction of grants issued to children whose grants have been reduced because of prior payments to avoid eviction for nonpayment violates the fundamental mandate of the Social Security Act's Aid to Dependent Children Program, "to enable the child's unmet need to be supplied." HEW Handbook of Public Assistance, Part IV § 3401, and to refrain from penalizing children for the difficulties, faults or misfortunes of their parents.

XI

AS AND FOR A FOURTH CAUSE OF ACTION

1) All persons deemed needy in New York under § 131-a of the Social Services Law have their subsistence grants determined by the schedules provided in that statute without any deductions except for available income and resources.

2) § 137 of the Social Services Law exempts the grants of all recipients of public assistance from execution levy, assignment or transfer.

3) Plaintiffs as persons threatened with eviction for nonpayment, regardless of cause or circumstances, are singled out and forced by 18 NYCRR § 352.7(g) (6) to accept a drastic six month reduction in subsistence grants though no additional income or resources are available to compensate for said reduction.

4) Said regulation irrationally and invidiously discriminates against plaintiff victims of eviction. No basis exists in law or fact, consistent with the purposes of the Social Security Act, for reducing the level of payments to plaintiffs who are then forced to live far below the subsistence levels provided to all other persons. Said regulation applies a wholly different standard in determining the grant levels of plaintiffs than the income resource and exemptions from levy standard, applicable to all other persons in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

XII

AS AND FOR A FIFTH CAUSE OF ACTION

1) 18 NYCRR § 352.7(g)(6) provides for the automatic recoupment of rent "advances" made to prevent eviction for nonpayment of rent received previously in a grant, without any standards regarding or required determination as to the circumstances resulting in non-payment.

2) There is no required relationship between the reduction or attribution of income imposed by said regulation and the acts, omissions, fault, or needs of the respective families affected the innocent family whose nonpayment of rent resulted from circumstances entirely beyond its control, as with theft, is lumped together with all others. Regardless of circumstances which caused non-payment eviction, all families so threatened are summarily reduced in the next six months.

3) The deprivation of statutory basic needs without any required standards relating that reduction to the particular facts in each instance violates the due process clause of the Fourteenth Amendment to the United States Constitution.

XIII

PLAINTIFFS HAVE NO ADEQUATE REMEDY AT LAW

The implementation of 18 NYCRR § 352.7(g)(6) is causing and will continue to cause immense, irreparable and devastating harm to families with children whose basic needs of survival, food, clothing, and other essentials of life have been drastically curtailed, unless enjoined forthwith.

WHEREFORE, plaintiffs respectfully pray on behalf of themselves and all others similarly situated that a three judge District Court be convened for the following purposes:

- 1) Enter preliminary and permanent injunctions enjoining the defendants, then successors in office, agents, employees and all other persons in active concert and participation with them from enforcing 18 NYCRR § 352.7(g)(6) on the grounds that said regulation violates the requirements of the federal Social Security Act and regulations promulgated thereunder and the Due Process and Equal Protection Clauses to the Fourteenth Amendment to the United States Constitution.

- 2) Enter in declaratory judgment holding that 18 NYCRR § 352.7(g)(6) is violative of the federal Social Security Act and regulations promulgated thereunder and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution in that said regulations reduces the level of payments of all persons issued made-up rent payments to forestall eviction without any additional income or resources being available to meet or make up for said reduction, while all other persons similarly without income or resources receive their full statutory entitlements.

- 3) Allow plaintiffs their costs herein and grant them and all other persons similarly situated such additional or alternative relief as the Court may deem to be just and proper.

Dated: February 10, 1972

LEONARD S. CLARK
By: BURR C. HOLLISTER,
Of counsel
Nassau County Law
Services Committee, Inc.
Attorney for Plaintiffs
1570 Old Country Road
Westbury, New York 11590
(516) 997-9680

IN UNITED STATES DISTRICT COURT

72 C 182

[Title Omitted]

ORDER TO SHOW CAUSE

Let defendants show cause in Courtroom No. 5 of the United States Courthouse, 225 Cadman Plaza, Brooklyn, New York, on the 18th day of February, 1972, at 10:00 A.M. or as soon thereafter as counsel may be heard why an order should not issue or the Court take such other action as shall grant the plaintiffs herein the following relief:

(1) A preliminary and permanent injunction restraining and enjoining defendants WYMAN and SHUART, their successors in office, agents and employees, and all persons in active concert and participation with them, from enforcing and implementing § 352.7(g) (6) of Title 18 of the New York Code of Rules and Regulations;

(2) The convening of a three judge statutory court for the purpose of hearing and determining this application upon a preliminary and permanent injunction pursuant to the requirements of 28 U.S.C. § 2281 and § 2284.

(3) An order determining that this action may properly proceed as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

Let the defendants further show cause why a temporary restraining order pursuant to 28 U.S.C. § 2284 should not issue restraining the defendants, their successors in office, their agents and employees and all persons in active concert and participation with them, from taking any steps toward enforcing the mandatory six month reduction of basic needs allowances required by 18 N.Y.C.R.R. § 352.7(g) (6), pending the hearing and determination of plaintiffs' motion for a preliminary and permanent injunction by a three judge court convened pursuant to 28 U.S.C. §§ 2281 and 2284.

Plaintiffs seek this temporary restraining order and preliminary and permanent injunction on the grounds that:

(1) 18 N.Y.C.R.R. § 352.7(g)(6) is violative of the Social Security Act, 42 U.S.C. § 601 *et seq.*, and the regulations promulgated thereunder. 45 CFR § 233.20(a), § 233.120, and is further invalid under the Due Process and Equal Protection Clauses to the Fourteenth Amendment to the United States Constitution;

(2) Plaintiffs and all others similarly situated are suffering immediate irreparable injury in that they are without the minimum means to provide themselves and their children with the basic necessities of food, clothing, household items, transportation and other essentials, as alleged in the complaint herein and the affidavits of CYNTHIA HAGANS, sworn to January 28, 1972, BERTHA GRISSETT, sworn to on February 3, 1972, KAREN HORNECK, sworn to on January 31, 1972, KATHRYN ZAVERZENCE, sworn to on January 31, 1972, and EURLEEN CARSON, sworn to on January 31, 1972. Immediate action to restrain 18 N.Y.C.R.R. § 352.7(g)(6) is required to prevent further injury to plaintiffs, as is alleged in the affidavit of BURR C. HOLLISTER, sworn to on February 8, 1972;

(3) The issuance of a temporary restraining order and preliminary injunction will in no way cause undue inconvenience or loss to defendants, but will prevent irreparable harm to plaintiffs;

(4) Plaintiffs have no adequate remedy at law as set forth in the complaint and affidavits submitted herewith.

IT IS ORDERED that service of this Order and the papers on which it is granted upon defendant WYMAN at his New York City office at 270 Broadway, New York, New York and upon defendant SHUART at County Seat Drive, Mineola, New York, on or before the 14th day of February, 1972, at 4:00 P.M. be deemed sufficient.

IT IS FURTHER ORDERED that service of the summons and complaint and this Order and the papers upon which it is granted may be made by the attorney for plaintiffs in this action.

SO ORDERED

/s/ Jacob Mishler
United States District Judge

At the United States Courthouse, 225 Cadman Plaza,
Brooklyn, N.Y. this 10th day of February, 1972.

IN UNITED STATES DISTRICT COURT

[Title Omitted]

AFFIDAVIT AND MOTION

BURR C. HOLLISTER, being duly sworn, deposes and says that:

1. I am of counsel to Leonard S. Clark, attorney for the plaintiffs herein and make this affidavit in support of plaintiffs motion for the immediate convening of a three judge District Court pursuant to 28 USC § 2281 and 2284, a temporary restraining order and preliminary injunction restraining the enforcement of 18 NYCRR § 352.7 (g) (6).

2. Plaintiffs in this action seek a declaratory judgment that 18 NYCRR § 352.7(g) (6) violates the Federal Social Security Act of 1935, 42 USC § 602(a), the regulations promulgated thereunder, 45 USC § 233.120 (a), and HEW, Handbook of Public Assistance Administration, Part IV § 3131 and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States in that said regulation mandates the six-month lowering of plaintiffs' basic needs allowance where there is no additional income or resources available while all other needy families receive their full public assistance entitlements.

The named plaintiffs are five families residing in Nassau County. The five mothers and twelve infant children presently receive Aid to Dependent Children in monthly grants composed of a shelter grant to meet rent obligations, a basic needs grant to provide food, clothing, furniture, household supplies, bathroom accessories, transportation, utilities, and all other basic essentials of life, and a fuel for heating grant where heat is paid for by the recipient. Plaintiffs sue on behalf of all persons similarly affected or threatened by the application of challenged regulation. Defendants WYMAN and SHUART are the respective commissioners of the New York State Department of Social Services and Nassau County De-

partment of Social Services, both charged with the duty of enforcing said regulation.

3. Prior to August, 1971, needs of families in New York faced with imminent eviction were issued by Emergency Assistance pursuant to 45 CFR § 233.20 and § 350-j of the Social Services Law, to prevent displacement. No recoupment was sought for those funds expended to prevent eviction. On August 7, 1971, 18 NYCRR § 352.7(g)(6) was promulgated by the New York State Department of Social Services making recoupment mandatory, over a six month period from a family's basic needs budget, of all payments made to prevent eviction for nonpayment of rent for which a grant had been previously issued.

4. During the past several months, each of the plaintiffs faced imminent eviction for nonpayment in court proceedings brought by their respective landlords. Either one or two month's rent was owing in each instance and the reasons for nonpayment of such rent vary from undisputed theft of the entire month's grant, as for BERTHA GRISSETT, and prior inadequate rent allowances, as for CYNTHIA HAGANS, to use of the funds to locate new housing, as for KATHRYN ZAVERZENEC.

5. Regardless of the reason for nonpayment of the prior rent, and without the uncoerced consent of any of the plaintiffs, the Nassau County Department of Social Services issued rent grants to prevent eviction in each case, and then summarily and without proper notice has deducted the amount of that make up rent grant from the next six month's basic needs grants in six equal recoupments pursuant to the following statewide regulation made effective August 7, 1971:

"For a recipient of public assistance who is being evicted for nonpayment of rent for which a grant has been previously issued, an advance allowance may be provided to prevent such eviction or rehouse the family; and such advance shall be deducted from subsequent grants in equal amounts over not more than the next six months. When there is a rent advance for more than one month, or more than one rent advance in a 12 month period, subsequent

grants for rent shall be provided as restricted payments in accordance with Part 381 of this Title."

6. In none of the families was or is there any additional available income or resources to make up for these deductions during the coming months. Nor did the state or local agency even attempt to determine by notice and a hearing if such income or resources were to be available. The regulation totally ignores the only legitimate factors of eligibility permitted by the Social Security Act; the level of need, available income and resources and the maximum basic needs allowances by statute.

7. The results of this regulation are devastating and dramatic because the children in these families who have had eviction prevented are being deprived of vital necessities in their formative years. The amounts that remain after recoupment range from 9% to 77% of the amount needed to sustain family subsistence needs. In the most stark sense, they will lack even the barest food and clothing during the recoupment period. The following plaintiffs' cases are representative of needy families throughout the state being severely injured by this regulation:

a) CYNTHIA HAGANS and her two infant children, who fell behind in rent in 1971 because she received a rent allowance of \$165 and had to pay \$200, have basic needs of \$179 for February but will receive only \$17 or 9% of their needs.

b) BERTHA GRISSETT and her five children suffered a robbery in August, 1971 which was fully corroborated and is undisputed. Her \$250 August rent was issued in January to prevent eviction and her family's monthly basic needs allowance is being curtailed by \$41.66 from \$296 to \$255 or to 77% of actual needs, during the six months after February 1, 1972.

c) KATHRYN ZAVERZENCE and her eight month old child are losing \$45 per month from a basic needs grant of \$121, leaving a remaining \$76 or 56% for basic needs, each month for the next six months. This reduction represents a two month rental grant made to prevent eviction, from premises that Mrs. Zavesence wanted

desperately to move away from due to the slum conditions.

d) KAREN HORNECK pregnant and with a one year old son, likewise faced eviction from an apartment which she sought to escape because the gas heat inside was medically harmful to her son. The funds spent searching for shelter were not reimbursed and eviction was threatened. Summarily, a direct payment for two months arrears was made to the landlord, and \$33.33 is to be deducted in six installments, leaving \$108 or 70% of the funds needed to provide minimum essentials.

e) Beginning January 1972, EURLEEN CARSON and her two children are left with only \$77 per month because \$83.33 is being deducted each month to make up for a two month rent payment totaling \$500. The rent arrears resulted from error by the agency which had failed to send the landlord rent directly.

f) Scores of other families with children likewise affected are to have their basic needs allowances summarily cut under said regulation, regardless of income and resources available. Most of the plaintiffs and others have future rents paid on a "restricted basis" directly to the landlord to prevent future nonpayment.

g) Since the remaining shelter allowance is either directly paid to the landlord, or like heat expense, is a fixed amount which must be paid each month, only the "basic needs" portion of the grant for food, clothing and other essentials—can "absorb" the loss and in actual fact, the deprivation suffered must come from these items of need.

8. These devastating recoupments violate the requirement of the federal Social Security Act that levels of allowances for public assistance, once set by statewide standards in each state, be reduced *only* if and to the extent that there are available income and resources to meet or make up the reduction. Absent such available funds, no month's grant can be reduced or suspended since, regardless of payments in prior months, a family's need is to be assessed from month to month, not over an entire six month period.

9. The Social Security Act, and regulations promulgated thereunder as more fully shown in plaintiffs' Memo-

random of Law submitted herewith, provides that financial eligibility be determined based upon only such income as is actually available, and prohibits the reduction of federally funded public assistance grants below the grant levels established *unless* current income or resources are available in the amount of the reduction. 45 CFR § 233.20(a).

10. On information and belief, the United States Department of Health, Education, and Welfare has specifically found 18 NYCRR § 352.7(g)(6) to violate federal requirements:

“Regulation 352(g)(6), cited as 352g(7), in providing for deductions from subsequent grants of funds duplicated to avoid eviction is contrary to Federal Program Regulation 20-7 . . . Regulation 352g(7) . . . has the same deficiency relative to subsequent deductions of duplicate payments.”

See copies of HEW—WYMAN 1971 correspondence attached hereto as Exhibit A.

11. No child should be penalized or deprived for the acts, omission, fault or misfortune of his parent. Yet, the twelve named AFDC children herein are being crushed by exactly this process, in violation of the Social Security Act's requirement that AFDC assistance shall be “to enable the child's unmet need to be supplied.”

12. The Aid to Dependent Children assistance program is one half reimbursed by the federal government. Millions of federal dollars are received by New York each year in return for New York's being governed by the Social Security Act and the regulations promulgated thereunder by the U.S. Department of Health, Education and Welfare . . . On information and belief HEW has not approved New York's rent recoupment procedure. With each passing day, New York's regulation 18 NYCRR § 352.7(g)(6) blatantly violates these federal provisions.

13. Plaintiffs and their children have been threatened with eviction and are threatened now with crippling losses of their basic needs grants. Some needy families with income present will be denied eligibility through this recoupment device. Yet all others receive their full basic

needs allowances less available income and resources. There is no valid basis for reducing the grants of eviction victims who remain equally needy as are all other families receiving assistance, whose grants remain constant. All needy families except eviction victims have their grants determined by applying available income and resources against need. This discrimination is arbitrary, invidious and denies plaintiffs their right to Equal Protection of Law and Due Process of Law under the Fourteenth Amendment to the United States Constitution.

14. The plaintiff's claims herein are substantial. Defendants cannot in any way justify their departure from the federal requirement of deducting only available income for basic needs grants.

15. No prior application has been made for the relief requested herein. The plaintiffs and their children are suffering and will suffer irreparable and immediate harm because of the loss of basic needs allowances with no resources to meet those losses. The welfare allowance level is less than adequate for survival. Less food and clothing to these families is nothing short of absolute penury, destitution and want.

WHEREFORE, plaintiffs respectfully request that:

1. A three judge court be convened to hear and determine plaintiff's claims.

2. A temporary restraining order and preliminary injunction be issued restraining the defendants their agents and employees from enforcing 18 NYCRR § 352.7(g)(6) on the grounds that it probably violates the federal Social Security Act and regulations promulgated thereunder.

3. Such other and further relief as this Court may deem just and proper.

/s/ Burr C. Hollister
BURR C. HOLLISTER

EXHIBIT A
DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE

December 29, 1971

Mr. George K. Wyman, Commissioner
N.Y. State Dept. of Social Services
1450 Western Avenue
Albany, N.Y. 12203

Re: Plan Submittal 71-68
(Standard of Assistance)

Dear Commissioner Wyman:

On November 15, 1971 we wrote you with reference to Submittal 71-61 advising that Regulation 352 g (6), cited as 352 g (7), in providing for deductions from subsequent grants of funds duplicated to avoid eviction is contrary to Federal Program Regulation 20-7. We would like to bring to your attention that Submittal 71-68 continues the cited provision now in Regulation 352g(7) and adds a new subdivision (g) 5 of Regulation 352, which has the same deficiency relative to subsequent deductions of duplicated payments.

We have noted that in these two citations restrictive payments "may" be made of subsequent grants. Regulation 352.7(g)(1) providing for the handling of rent payments subsequent to fraudulent claims no non receipt of checks also indicates use of a restrictive payment. As you know, restrictive payments are not subject to Federal participation unless they fall within the Federal program guides in Regulations 20-4 and 20-5 (Protective Payments).

If it is felt that discussion of any of the foregoing is indicated; staff of the Regional Office is available.

Sincerely yours,

ELMER W. SMITH
Regional Commissioner

JDP:bf

cc: Mr. Smith
Mr. B. Luger
Audit Agency

EXHIBIT A

DEPARTMENT OF HEALTH, EDUCATION,
AND WELFAREREGION II
26 Federal Plaza
New York, New York 10007

[SEAL]

Social and Rehabilitation Service

Mr. George K. Wyman, Commissioner
N.Y. State Dept. of Social Services
1450 Albany Avenue
Albany, New York 12203
Re: Plan Submittal 71-61 (Standards of Assistance)

Dear Commissioner Wyman:

The captioned subject amends four of your States Regulations.

The Regulation 352.7 (g) provides for advance of rental payments by local agencies to recipients who are being evicted for non payment of rent, in instances in which such a grant has previously been made. It further provides that the duplicated payment will be "deducted from subsequent grants in equal amounts over not more than the next six months."

Regional staff has had several discussions with your staff on the matter of the subsequent deductions. In accordance with Federal Policy such subsequent deductions may be taken only if such funds are available. Our reference is Federal Program Regulation 20-7-item (3) (ii) (c) and (d). As presently written Regulation 352.7 (g) therefore does not meet Federal requirements.

We will be glad to further discuss this matter with your staff, if this is indicated.

Sincerely yours,

/s/ Elmer W. Smith
ELMER W. SMITH
Regional Commissioner

IN UNITED STATES DISTRICT COURT

[Title Omitted]

ANSWER

Defendant, George K. Wyman, Commissioner of the New York Department of Social Services, alleges as answer:

I. Defendant denies so much of paragraphs II that alleges that 18 NYCRR § 352.7(g)(6) violates the requirements of federal law or the Federal Constitution, and that alleges that the needs of the plaintiffs are not met.

II. Defendant denies paragraph IV(2).

III. Defendant denies so much of paragraphs V(3), (5), (6), (7), 8 and VI(3) that alleges that defendants have a duty to meet current needs, that the amount of assistance cannot legally be reduced for any given month unless there is available income to make up the reduction, and that needs of the plaintiffs are unmet.

IV. Defendant denies so much of paragraph V(5) and VI(3) that alleges that any element of choice is illusory and coerced, and denies so much of paragraph V(8) that alleges a denial of Welfare eligibility to plaintiffs.

V. Defendant denies so much of paragraph VI as alleges that this complaint presents a proper class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

VI. Defendant denies knowledge and information sufficient to form a belief as to each and every allegation set forth in paragraphs VI(2)(a), (b), (c), (d), and (e).

VII. Defendant denies each and every allegation set forth in paragraphs VIII(1) and (6), IX, X(1), (2), (3), and XI.

VIII. Defendant alleges that the complaint *in toto* does not state a claim upon which relief could be granted.

WHEREFORE, defendant requests that the order temporarily restraining defendants from implementing 18

NYCRR § 352.7(g) (6) be rescinded and the complaint be dismissed.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendant
George K. Wyman
80 Centre Street
New York, New York 10013

IN UNITED STATES DISTRICT COURT

[Title Omitted]

72 C 182

TEMPORARY RESTRAINING ORDER

Plaintiffs having moved this Court pursuant to Title 28 United States Code Section 2284(3) for a temporary restraining order restraining the defendants from enforcing the provision of 18 NYCRR § 352.7(g)(6) which requires that any "advance" payments made to prevent eviction of, or to rehouse a family threatened with eviction for nonpayment of rent for which a grant has been previously issued, be deducted from subsequent grants in equal amounts over not more than the next six months, and this motion having been considered by this Court.

Upon the pleadings, affidavits, exhibits and briefs submitted on behalf of the parties, and upon the finding by this Court that (1) substantial questions have been raised by plaintiffs about the validity of said deduction requirement of 18 NYCRR § 352.7(g)(6) insofar as it effectuates a reduction in the grant levels of public assistance for families if threatened with eviction without any available income or resources being present, which require further consideration by a statutory three judge court, and (2) recipients of public assistance throughout the State of New York are now suffering, and will continue to suffer, irreparable injury as a result of the said deductions from basic needs allowances mandated by said regulation, it is,

ORDERED, ADJUDGED and DECREED that, pending hearing and determination by a single judge court of the statutory claim determining the validity of the mandatory deductions effectuated by said 18 NYCRR § 352.7(g)(6) [now 352.7(g)(7) as promulgated December 6, 1971]:

Defendant WYMAN, his successors in office, agents and employees, and all persons in active concert and participation with them, including local social services officials

administering the Aid to Families with Dependent Children and Aid to the Aged, Blind and Disabled programs under State supervision, insofar as said officials have actual notice of this temporary restraining order, are hereby restrained from denying, reducing or discontinuing public assistance benefits on the basis of deductions mandated by 18 NYCRR § 352.7(g)(6) for payments made to prevent eviction or to secure rehousing of families threatened by eviction for nonpayment of rent for which a grant has previously been issued, provided the time limitation of 6 months is extended for the period of the stay.

DATED: Brooklyn, New York
February 18, 1972

/s/ Jacob Mishler
U.S.D.J.

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT NEW YORK

72 Civ. 182

[Title Omitted]

STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between the respective attorneys for the parties herein, that the following facts are admitted and agreed upon and require no proof.

1. The plaintiffs in this action are CYNTHIA HAGANS, individually and on behalf of her minor children, Kimberly age 5 years, and Korey age 14 months, BERTHA GRISSETT, individually and on behalf of her minor children, Deborah age 12, Angelo age 10, William age 9, Linda age 8 and Cynthia age 6, KATHRYN ZAVERZENEC, individually and on behalf of her minor child, Dana Lynn age nine months, KAREN HORNECK, individually and on behalf of her minor children, Todd age one year and an expected baby, EURLEEN CARSON, individually and on behalf of her minor children, Timothy age 11 and Calvin age 13, as well as all recipients of public assistance in the Aid to Dependent Children category residing in New York State whose monthly grants have been reduced to prevent eviction by virtue of the implementation and application of 18 N.Y.C.R.R. § 352.7 (g) (6).

2. Defendants are GEORGE K. WYMAN, the Commissioner of the New York State Department of Social Services and JAMES M. SHUART, Commissioner of the Nassau County Department of Social Services, both of whom are public officials charged with administering the public assistance in compliance with state and federal law.

3. New York State's program for Aid to Families with Dependent Children (AFDC) is operated with 50% federal financial reimbursement, pursuant to the requirements of the Social Security Act, 42 U.S.C. § 601 et seq.,

New York receives millions of dollars annually in federal monies to help operate and fund its AFDC program. Pursuant to required state plan, 42 U.S.C. § 602(a) (23), New York State has enacted Social Services Law § 131-a, which provides for a schedule of basic needs per family based on the number of individuals per household and a concomitant schedule of grants and allowances. The standard of need represents items of basic maintenance such as food, clothing, utilities, furniture, household supplies, laundry, personal expenses, transportation, etc., as set forth in *Rosado v. Wyman*, 322 F. Supp. 1173 (E.D. N.Y. 1970) but exclusive of shelter and fuel. The schedule of grants as set by § 131-a, Laws 1971 Ch. 133, establish that for AFDC families, New York pays ninety percent of the statewide standard of need.

4. By regulation, 18 N.Y.C.R.R. § 352.3, each social services district in New York has established a maximum monthly allowance schedule for rent. The rent allowance in each case is in the amount actually paid by the recipient family but not in excess of the respective appropriate maximum of the schedule. Where fuel is paid separately, a monthly grant therefor is also issued as per 18 N.Y.C.R.R. § 352.5.

5. On August 6, 1971, the New York State Department of Social Services promulgated a new statewide regulation 18 N.Y.C.R.R. § 352.7(g) (6), which provides that for a recipient who is being evicted for non-payment of rent for which a grant has been previously issued, an advance allowance may be provided to prevent eviction or rehouse the family and that such advances shall be deducted from subsequent grants in equal amounts over not more than six months.

* * * *

7. The plaintiff, CYNTHIA HAGANS, and her two minor children are eligible for and receive Aid to Families with Dependent Children and their monthly basic needs in accordance with Social Services Law § 131-a have been determined to be \$179, their monthly grant being \$161. In 1971 she lived in an apartment in Massapequa, New York, with a monthly rental of \$200; she then received a shelter allowance from the Nassau County

Department of Social Services in the amount of \$165, the maximum allowed under the Nassau County Department of Social Services rent schedule, and was unable to locate alternate housing at that rental. Plaintiff HAGANS accumulated arrears on her rent payments because of the \$35 deficiency for which no allowance was made in the basic needs grant. In December 1971, plaintiff was one month in arrears. In January 1972, plaintiff HAGANS was evicted from her apartment for non-payment and was served with a warrant. Plaintiff HAGANS used her January shelter allowance for expenses related to securing new housing. In January 1972, the defendant SHUART, because of the emergency presented, approved the new housing which Mrs. Hagans had located in Amityville, a one family home at a monthly rental of \$175 per month with fuel extra, but informed plaintiff that pursuant to 18 N.Y.C.R.R. § 352.7(g)(6) her February grant would be reduced from \$357, comprised of \$175 rent, \$161 basic needs plus \$21 for fuel, to \$192 because of a recoupment of the \$165 duplicate rent payment made in January. The deduction of the month's rent was made in a single month because plaintiff's new housing is in Suffolk County and Nassau County is responsible for issuing grants for the family's assistance only through February 1972, pursuant to State Regulations mandating a two-month carryover period when a family moves from one district to another within New York State. Only one month, February, was available to Nassau County for recoupment. Out of the \$192 grant in February, \$175 must be paid for rent, leaving \$17 for basic needs for the family of three. Plaintiff HAGANS has no additional income or resources to meet basic needs in February, 1972.

8. Plaintiff BERTHA GRISSETT and her five infant children receive Aid to Families with Dependent Children and receive a monthly grant of \$296, exclusive of shelter and fuel, to cover all the family's basic needs. In August, 1971, plaintiff GRISSETT suffered a robbery of the proceeds of her full grant, \$593.75, which amount included her shelter allowance of \$250. The fact of the robbery and resulting loss was established in New York

State Supreme Court, Nassau County (New York Law Journal, October 22, 1971, p. 20, col. 3). The defendant SHUART issued a duplicate rent allowance in January 1972 when eviction was threatened and made payment of the August 1971 rent. The defendant SHUART notified plaintiff GRISSETT that effective February 1, 1972, her grant of assistance would be reduced by the sum of \$41.66 for a period of six months to recoup the duplicate August payment. That in February 1972, plaintiff GRISSETT's grant to cover the basic needs for the family of six were reduced from \$296 to \$254.34. Plaintiff GRISSETT has no additional income available to meet the family's basic needs.

9. Plaintiff KATHRYN ZAVERZENEC and her infant child receive Aid to Families with Dependent Children from the defendant SHUART. The family of two receive a total monthly grant of \$121 to cover the family's basic monthly needs, exclusive of a \$135 shelter allowance. Plaintiff did not pay the rent for December 1971 and January 1972, complaining of the condition of the apartment and its state of disrepair. A non-payment proceeding was commenced against plaintiff, and the defendant SHUART, without plaintiff's knowledge or consent, paid the sum of \$270 representing the rent sued for, directly to the landlord, thereby causing the non-payment proceeding to be terminated. In January 1972 plaintiff ZAVERZENEC was informed that pursuant to 18 N.Y.C.R.R. §352.7(g)(6) the family's basic needs grant would be reduced from \$121 to \$76 for a six month period to recoup the rent paid by defendant SHUART. The fixed shelter cost of \$135 is being sent directly to the landlord on a restricted payment basis pursuant to 18 N.Y.C.R.R. §352.7(g)(6). Plaintiff ZAVERZENEC has no additional income or resources to meet the family's full basic needs during the period of the recoupment.

10. Plaintiff KAREN HORNECK, who is pregnant, and her child are receiving Aid to Families with Dependent Children from defendant SHUART. Plaintiff HORNECK receives a monthly grant of \$154 to cover the family's basic needs. Plaintiff HORNECK and her

family occupy an apartment for which the monthly rent is \$100 and which requires payment for fuel separately. Plaintiff's child was found by his physician to be allergic to the gas heating system in his room and experiences bronchitis attacks. Plaintiff did not pay the January 1972 rent, contending that the money was used for expenses related to obtaining alternative housing. The defendant SHUART in January 1972 paid the rent without plaintiff HORNECK's knowledge or consent directly to the landlord. Plaintiff HORNECK was notified that the defendant SHUART, pursuant to 18 N.Y.C.R.R. §352.7(g) (6) would recoup the \$200 over a period of six months effective February 1, 1972. In February 1972 plaintiff HORNECK received a grant of \$108 instead of the state determined level of assistance for a family of two \$142. (\$127 basic needs plus \$21 for fuel). The landlord received rent directly on a restricted payment basis pursuant to 18 N.Y.C.R.R. § 352.7(g) (6). Plaintiff has no additional income to meet the family's needs.

11. Plaintiff EURLEEN CARSON and her two infant children receive Aid to Families with Dependent Children from JAMES M. SHUART. Prior to August 15, 1971, the family resided in the Jericho Motel in Jericho, New York, and received a monthly grant of \$353 including restaurant allowance to meet their basic needs, exclusive of shelter which was paid directly to the motel. That in August defendant SHUART secured an apartment for the family in Freeport at a monthly rent of \$250 Plaintiff's first month's rent was paid directly to the landlord by defendant SHUART. Plaintiff made no payments of rent in October and November, 1971, by reason of her misapprehension that defendant SHUART would continue making direct payments of rent to the landlord by voucher. In December 1971, plaintiff CARSON was informed by the Department of Social Services that they had not paid the landlord directly but had included a shelter allowance of \$250 in each monthly grant since September 1971. The defendant SHUART paid the sum of \$500 to the landlord when eviction was threatened and informed plaintiff CARSON in January 1972 that pursuant to 18 N.Y.C.R.R. § 352.7(g) (6) said sum would

be recouped from the family's monthly basic needs grant of \$161 over a period of six months. Effective February 1, 1972, the family's grant for basic needs was reduced from \$161 to \$77.65, the landlord now receiving rent on a restricted payment basis as per 18 N.Y.C.R.R. § 352.7 (g) (6). Plaintiff has no other income to meet the family's basic needs during the period of the recoupment.

. . . .

13. That the United States Department of Health, Education and Welfare (HEW) is the federal agency charged with the primary responsibility for interpreting the AFDC requirements of the Social Security Act and of reviewing state plans that are federally funded as they relate to the requirements of the Social Security Act and the regulations promulgated thereunder.

14. To determine whether state plans continue to meet the federal requirements, New York and each state is required by regulation to submit to HEW for review all relevant changes such as new state statutes, regulations and court decisions.

15. In 1971, defendant WYMAN submitted 18 N.Y. C.R.R. § 352.7(g) (6) to the Regional Commissioner of HEW. Consultations were held subsequent thereto regarding the validity of the regulation and federal reimbursement being available thereunder. By letter dated November 15, 1971, HEW's Regional Commissioner informed defendant WYMAN that 18 N.Y.C.R.R. § 352.7 (g) (6) did not meet the federal requirements embodied in 45 CFR § 233.20(a). By letter dated December 29, 1971, HEW again informed defendant WYMAN of HEW's objections to the recoupment provision. Copies of said correspondence between HEW and defendant WYMAN are hereby acknowledged and introduced into evidence.

16. The affidavits submitted herein by plaintiff and defendant are accepted into evidence as part of the record herein.

Dated: Brooklyn, New York
February 28, 1972

/s/

CARL JAY NATHANSON
Attorney for Plaintiffs

/s/

MICHAEL COWONER
Attorney for Defendant
Wyman

/s/

JAMES N. GALLAGHER,
Attorney for Defendant
Shuart

IN UNITED STATES DISTRICT COURT

72 C 182

[Title Omitted]

TESTIMONY OF ARTHUR J. DORING

United States Courthouse
Brooklyn, New YorkFebruary 28, 1972
10:00 o'clock A.M.

Before:

HON. JACOB MISHLER,
Chief U.S.D.J.ILENE GINSBERG
Acting Official Reporter

Appearances:

Leonard C. Clark, Esq.,
Attorney for Plaintiff

By: CARL JAY NATHANSON, Esq., of counsel.

Louis J. Lefkowitz
Attorney General, State of New York
Attorney for Defendant

By: MICHAEL COLODNER, Esq., of Counsel.

Joseph Jaspan, Esq.
Nassau County Attorney

By: JAMES GALLAGHER, Esq., of Counsel.

[18]*

* * * *

THE COURT: All right. Call your first witness.

MR. COLODNER: The defendant calls Arthur J.
Doring.

* Numbers in parenthesis refer to pagination of trial transcript.

THE CLERK. State your name and address for the Court.

THE WITNESS: Arthur J. Doring, D-o-r-i-n-g, 40 Kinlich Avenue, Troy, New York.

ARTHUR J. DORING, being called as a witness, first being duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. COLODNER:

Q What is your present position, sir?

A Consultant with the State Department of Social Services.

Q What position did you hold prior to this?

A Special Consultant, Bureau of Program Standards, State Department of Social Services, Division of Family Services.

THE COURT: Your expertise is in family what?

THE WITNESS: Family services.

[19] THE COURT: Division of Family Services—all right.

Q Are you familiar with the regulation 18 NYCRR 352.7(g) 6?

A I am.

Q On what do you base your knowledge of this regulation?

A On the policy and the format of the regulations.

Q Could you describe the activity that you participated in with regard to developing this regulation?

A One of the problems that we had encountered, particularly last year, or last year it came to light that there was a very high cost problem of hotel, motel residency. The high number of recipients being housed in hotels and motels was due to a lack of private dwellings. We had at the time completed the study in Nassau County because of the very high cost that was involved in that particular county, and then they had requested that we review our reimbursement policy on the hotels, motels.

On the basis of this we did a thorough review of each case that had been housed in May and June.

Q What year?

A 1971, in Nassau County.

Q What were the results of this study?

[20] MR. NATHANSON: I object. I ask the study be offered and that is the best evidence.

THE COURT: Is there an official report of the study?

THE WITNESS: Yes, sir.

MR. COLODNER: I will offer it into evidence.

THE COURT: You may point out the pertinent parts of the report, but if that is the official document I think that is what should be offered.

Q Is this the report you refer to?

A Yes; it is.

MR. COLODNER: I would like to offer this.

THE COURT: Any objection?

MR. NATHANSON: I have not seen it yet.

No objection.

THE CLERK: Report—

THE COURT: Do you have an extra copy of the report?

MR. COLODNER: No.

[21] THE COURT: Is it available?

MR. COLODNER: We had a very difficult time in locating that one. If I could Xerox it—

THE CLERK: Eleven page report marked Defendant's Exhibit A in evidence.

(So marked.)

THE COURT: Do you require this, counsel?

MR. COLODNER: No.

Q As a result of this report what changes in policy were recommended?

A The major change in policy was the development of regulations. We felt it would be an administrative tool which we thought would help people in managing their money in terms of duplicate rent payment. Our figures in that report show a significant number, approximately 62 percent—

THE COURT: Just a moment, please. Would you read that back.

(Read by reporter.)

THE WITNESS: That is correct. 62 percent were in hotels or motels because of eviction for non-payment of rent.

[22] **Q** Why was the provision for duplicate payment instituted?

A I believe that—

MR. NATHANSON: Objection.

THE COURT: Read that back, please.

(The reporter read the preceding question.)

THE COURT: I will allow the question.

Q Why were duplicate payments then instituted?

A There had been duplicate payments. Previously agencies had made duplicate payments to prevent eviction. What was added to this report was the provision that there be recoupment from a duplicate payment.

Q Why was this?

A Primarily because of management problems. There was a consensus of the people that worked on the regulation policy that we wanted to avoid wide spread abuse. We were limited by law in paying basic grants plus shelter items. It was the consensus of the policy making group that with the duplicate payment system it would prevent wide spread use of letting the rent go—having it duplicated—and essentially, this would correct the problem, if we could recoup.

Q Would there be any problems involved if the [23] persons—

MR. COLODNER: I withdraw that.

THE COURT: There are two theories upon which I can accept testimony at this time. One, if it explains the language or the unclear thoughts of the report, and two, where Mr. Doring is testifying as an expert in a particular field, as a consultant.

So when you say "Why?", I suppose it is one of those two theories. When he says there is a consensus of opinion he is not giving his opinion he is really telling what is in the report.

THE WITNESS: May I specify, Your Honor that I wrote that report? This is my language.

THE COURT: I see.

How many were in this project?

THE WITNESS: I think I had six. I received cases from caseworkers who did the actual case reviews who are employees of our department, the State Department of Social Services.

[24] THE COURT: Were these from outside the county?

THE WITNESS: Yes. We have a division where we operate the state hospitals, and we have social service workers on that staff. I made use of these people.

THE COURT: So it is really your report, and the statistical information was gathered by you, by your people?

THE WITNESS: Yes. I summarized it and wrote the narrative.

Q The recommendation of the report, I take it, is that recoupment be instituted as one means of solving the problem?

A That is correct.

Q If the State is not able to use recoupment as a means of providing duplicate payment, what alternatives would it have?

A We placed people on indirect payment. You see, the rent item which is a restricted grant, we have limits in terms of Federal financial participation on restrictive payments in family cases, in that we can receive 10 percent of the family restricted payment in one month without [25] losing Federal aid.

Q So then who would bear the cost?

A The State and County.

Q To your knowledge, has the State issued any written interpretation of this regulation, 352.7(g)6 other than the language of the regulation itself?

A The only thing we have is the regulation as it is contained in the bulletin material on standards, and that is the language of the regulation.

Q No other language?

A No.

THE COURT: If you made the check payable to the person and the landlord—

THE WITNESS: That is restricted, Your Honor.

THE COURT: If you made two separate payments

to the recipient and you suggested very strongly to the recipient that it should be used as payment for rent—well, I don't know if it would work.

THE WITNESS: When we compute a grant of assistance we compute it on basic needs. Then we add a shelter allowance and a heating, which is a fuel allowance and when this is [26] completed a copy of that budgetary computation is given to the recipient so he or she is aware of the major breakdown of the computation of the check. We cannot tell the recipient this is for rent. He has free and unrestricted use of the money. But we have to give him a breakdown of how the grant was computed.

THE COURT: Are you talking about basic needs in terms of minimum subsistence levels?

THE WITNESS: Well, according to the standards that are set. Food, clothing personal items. The normal factors.

THE COURT: You are familiar with the term "standard of need"?

THE WITNESS: Yes.

THE COURT: What is that?

THE WITNESS: That consists of all the items such as what I have just mentioned; food, clothing, incidentals, household supplies, plus shelter, plus rent. That is the standard of need, plus fuel for heating translated into monthly amounts.

[27] **THE COURT:** Those monthly amounts represent the minimum amount needed for—

THE WITNESS: Subsistence.

THE COURT: Which translated in the common vernacular really means to support life.

THE WITNESS: That is correct.

THE COURT: And the benefit in New York State is 100 percent on the standard of need. Not the other states because, of course, it varies.

THE WITNESS: Yes.

THE COURT: Sometimes they tell you how much is required to live on and the state says we will give you half.

THE WITNESS: We have a ratable reduction. It is 10 percent and it applies to the basic standard of need, exclusive of the standard of rent and heat. It is 10 percent as based upon the schedule.

THE COURT: Translated once again into terms of recoupment it someone's check is within half of what the state determines the standard to be, then, in effect, what you are saying is [28] here is half of what you need to live on that month. Is that right?

THE WITNESS: I believe you could say that correctly.

THE COURT: You understand that that is what bothers me.

All right. Continue.

Q Prior to the formation and the implementation of this regulation what was the prior policy in this State with regard to duplicate payments and recoupment?

A In circumstances where it turned out that checks are not stolen, but were duplicated, we have provision for recoupment. That would apply to circumstances where the checks were used fraudulently.

THE COURT: So where the money the recipient receives, and the recipient is distinguished from the children, where the recipient used that money fraudulently then recoupment was the policy?

THE WITNESS: Yes.

THE COURT: Over what period did you recoup?

THE WITNESS: I don't believe we had a set policy as to the period of time, Your Honor.

[29] **THE COURT:** All right.

THE WITNESS: I believe the regulation simply indicates it can be recouped. I would have to refer to the regulation.

Q Was there any other statement in the regulations with regard to the recoupment?

A I don't believe so.

Q Do you have any knowledge of a locality having a recoup provision?

A I believe the State of New York.

Q In what circumstance?

A Duplication of rent payments.

THE COURT: I would like you to go to the policy prior to the promulgation of the regulation regarding all other types of loss. I now know that in fraud the county would have recouped, but how about all other types of loss that have no wrong doing? How about pure negligence where the parties just lost the money?

MR. NATHANSON: You are asking about prior policy?

THE COURT: Yes. I am interested in what the change is because apparently the [30] County seeks to limit the effect of this regulation to just certain situations and not to all situations, which include fraud, mismanagement, no fault, and so forth. I want to know what the difference is and why the need for the regulation. I think this would point it up if I knew what the policy was before the regulation.

Q With regard to the policy before the regulation in what specific circumstance was recoupment permitted either by the State or localities?

A You are asking for recoupment or duplication?

Q Duplication with recoupment.

A We have, under—

THE COURT: Excuse me. Maybe I don't understand the significance of the question. You will have recoupment only where there is duplication. If there is no double payment?

THE WITNESS: I am trying to understand the question. I believe you mean policy with regard other than the duplication of payment of rent, and we have one where cash is lost or stolen. The agency may duplicate and there is no recoupment requirement.

[31] **THE COURT:** I see.

Suppose Mrs. Hagans saw a big sale on steaks one day and spent \$175 for steak. She has got them in the freezer and then it turns bad because she cannot use them. That is pure mismanagement. There would be no duplication?

THE WITNESS: That is correct. We have provisions in mismanagement for processing payment, but not for a particular item. These would be considered restrictive payments. If one required restrictive payments

what we would do would be to have a payee designated.

THE COURT: No, no. She spent her money foolishly and had no money for essentials. Suppose you duplicated that payment. Would you duplicate it prior to the regulation? This isn't fraud or loss.

THE WITNESS: Rent payment or any payment?

THE COURT: Duplicating a payment for basic needs.

THE WITNESS: We have no provisions [32] for basic needs.

THE COURT: Usually the failure to pay rent is due to mismanagement, so say she used the rent money to buy food. Pure mismanagement.

THE WITNESS: Under the present regulations the agency could duplicate and recoup where there is an eviction.

THE COURT: Before?

THE WITNESS: We had no policy before.

THE COURT: So you wouldn't recoup it?

THE WITNESS: Nor would we reimburse.

THE COURT: But when you duplicate the payment, doesn't that mean you reimburse? I am talking about the relationship between the County and the individual. You are saying that if the County's policy was to reimburse you would not reimburse the County.

THE WITNESS: Correct.

THE COURT: So we really don't know what the policy of the County was prior to the regulation. Would you know?

[33] THE WITNESS: You would have to ask the representative of the County. I could state that counties, statewide, do or have duplicated rent at their own expense.

Q If the agency makes a determination to reduce a monthly check because of recoupment of an advance allowance for rent under this regulation does the recipient have any remedy to contest this regulation?

A Yes. There is a fair hearing procedure.

THE COURT: The statute requires that, doesn't it?

THE WITNESS: Any reduction would raise the question of adequacy of assistance.

THE COURT: I am talking about the Federal statute. Isn't that one of the provisions?

THE WITNESS: For a fair hearing?

THE COURT: Yes.

THE WITNESS: Yes, sir.

Q If a fair hearing was applied for, and let us assume this hypothetical situation, that the recipient, that the reason she required an advance loan for rent was because she claimed the welfare money was stolen—the cash itself—would there be any circumstances under [34] which the State would oppose the claim of the recipient that the money should not be recouped?

MR. NATHANSON: I object. If he wants to ask about the facts in the case, fine. But a hypothetical question—

THE COURT: Would you read that back, please?

(The last question read by the reporter.)

THE COURT: I will allow it.

A If I understand correctly, if the claimant maintained the money was stolen, would that be a possibility that the agency would not be upheld on the recoupment issue?

Q Yes.

A That is a possibility.

Q In other words, is the regulation mandatory that in every case that a rent payment is duplicated that there has to be recoupment?

MR. NATHANSON: Objection. The regulation speaks for itself.

THE COURT: Overruled.

I will allow it.

A That is not our interpretation of the regulation. It is not that cut and dry that there has to be recoupment. [35] It is geared towards mismanagement.

Q If at a fair hearing a recipient—

THE COURT: First let me understand this. Did you help draw this regulation?

THE WITNESS: Yes.

THE COURT: It was your language?

THE WITNESS: Yes, sir.

THE COURT: It says "For a recipient of public assistance who is being evicted"—you say being evicted—"for non-payment of rent for which a grant has been previously issued, an advance allowance may be provided to prevent such eviction or rehouse the family"—where he has a family.

THE WITNESS: That is correct.

THE COURT: Shouldn't that read "must" instead of "may be"?

THE WITNESS: Must?

THE COURT: If the grant is not approved I assume there is an eviction.

THE WITNESS: Yes, sir.

THE COURT: Isn't it mandatory that you rehouse the family?

THE WITNESS: This is one of the [36] problems.

THE COURT: So I say, shouldn't that read "must"?

THE WITNESS: If we state "must" instead of "may be," we are in conflict with the Social Services Law that states the amount we can make provision for.

THE COURT: But you recognize this as an obligation to give shelter to a dependent family?

THE WITNESS: Yes.

THE COURT: So it is pretty strong that you have to do something—either prevent eviction or have the people housed.

The next is "Such advance shall be deducted from subsequent grants in equal amounts over not more than the next six months". Do you say that is optional, once you made the advance?

THE WITNESS: No. Once you make the advance on a duplication of rent on a mismanagement basis, it shall be recouped according to the regulations. If that advance is made, for example, on the basis that the funds [37] were stolen, it doesn't apply. We have no stipulation under 352.2 where we make a duplication of a grant for stolen funds regarding recoupment.

THE COURT: In other words, this subsection doesn't limit recoupment to mismanagement.

THE WITNESS: I concur with that.

THE COURT: Is there another section that does?

THE WITNESS: No.

THE COURT: So this is the only section that applies to duplication and the right to recoupment?

THE WITNESS: Other than fraudulence.

THE COURT: You say that the State provided a procedure for determining whether it is mismanagement or a wrong committed by the recipient, and if committed by the recipient then a recoupment is allowed, but if it is just pure mismanagement or rather if it is outside of the control of the recipient, then recoupment is not allowed?

THE WITNESS: I did say that was [38] generally done with full knowledge and consent.

THE COURT: Under this regulation, is the policy of this regulation that the recipient who is to be evicted consents to the agent paying the duplicate payment of rent before such payment is made?

THE WITNESS: I can only answer that by saying that it is good practice to discuss all practices with the recipient. The recipient has basic rights to know what is going on and what action the agency is taking or has taken. I would assume that the agency would discuss it with the recipient.

THE COURT: Could the recipient ask for a fair hearing on the grounds that she did not consent?

THE WITNESS: I think it would have to be on the grounds of inadequacy of assistance whether she consented or not, that if subsequent checks are in fact reduced as part of the recoupment her basis for a hearing would be on the fact that her checks did not meet the standard of need. In other words, inadequacy.

[39] THE COURT: I see.

One more question.

Could, at this first hearing, a recipient claim that the recoupment made was too harsh. Taking the situation of plaintiff Hagans that the recoupment should not have been made all in one month but should have been spread out over six months.

THE WITNESS: Certainly.

THE COURT: Does this regulation permit partial recoupment? For example, I think she says a certain

need was reduced to \$17 for that month. Could she say, recoup only a partial amount instead of recouping \$250, I think it was over a period of six months?

In other words, recoupment of the total amount, is that a mandate?

THE WITNESS: On the basis of the regulations I would say the total amount.

THE COURT: Even though it might result in the deprivation of the basic needs?

THE WITNESS: I believe that is correct.

THE COURT: I have no further questions.

You may cross-examine, Mr. Nathanson.

[40] CROSS-EXAMINATION

BY MR. NATHANSON:

Q Can you tell the Court how many cases of mismanagement there were in New York State last month?

A No.

THE COURT: Can you approximate it? Does it run into the hundreds of thousands or tens of thousands?

THE WITNESS: I don't have that data, Your Honor.

Q For the local county system to be reimbursed for payment that they made, do they have to fill out reports?

A What kind of reports?

Q Restricted payment. Is that information asked for?

A The restricted payments are because of the claims.

Q Duplicate payments?

A I don't know.

Q You wouldn't know how many number of restricted payments there were last year?

A No.

Q With respect to this regulation 352.7(g)6, is the local district required to hold any hearing before [41] they reduce this monthly grant?

A Any change in grant, I believe, the client is entitled to a review.

Q Before or after the reduction?

A Before.

Q Do you say the regulations require a hearing before reduction?

A Fair hearing?

Q What hearing are you talking about?

A Supervisory review in the local agency.

Q Do you say your regulation provided that type of hearing?

A I would have to research the regulation.

Q Would you let me show you a copy of the regulation?

A Surely.

MR. NATHANSON: May I, Your Honor?

THE COURT: Yes.

A I believe the regulations—perhaps Mr. Barry would be more familiar with it on the question of the hearings.

Q Now, to your knowledge, is a hearing required prior to the recoupment according to that regulation?

[42] A No. I didn't understand your question.

Q Is the consent of the recipient necessary before the local district recoups that money? In other words, before the local district can recoup the money does the recipient have to consent or is it done as soon as a duplicate grant for rent is made?

A It is an automatic procedure set up to initiate recoupment.

Q You are familiar with housing conditions in Nassau County?

A I believe so.

Q Would it be correct to state that there is an acute housing shortage in Nassau County?

A That is an under estimate.

Q Are there many families in Nassau County who receive aid for shelter from the Social Service Department whose aid constitutes less than the actual rent they pay?

A You would have to speak with the local agencies. Each county is required to submit a schedule.

Q The Department doesn't—I am talking about the State—that neither approves nor rejects schedules that the County promulgates.

A Yes, they do. They are required to file them with us for approval.

[43] Q Do you know of any case where the State has rejected a rent schedule?

A Myself, no.

Q You did a study of Nassau County regarding the housing conditions?

A That is correct.

Q I ask you again, are you aware of any instance where the shelter allowance that the clients received is less than the actual rent paid?

A In that study no, and those are the only cases I had seen.

Q If a client were paying more rent than the allowance they received, and they built up arrears on their monthly rent payments to the point where they required duplicate payments, is that client considered guilty of mismanagement?

A Are you asking for a subjective opinion?

THE COURT: As an expert. Your opinion as an expert. I think you are an expert in the field.

THE WITNESS: No.

Q They would not be entitled to a duplicate payment?

THE COURT: No. They would not be [44] charged with mismanagement.

A I wouldn't consider it mismanagement. I would consider that the person is living on a higher price schedule than the allowance provided.

Q But the regulation says where the Department has given a grant for rent and duplicated that grant there has to be a recoupment. Wouldn't that fall within your regulation—those facts?

A The facts you mentioned?

Q Yes, sir.

A It would be apt to, yes.

Q With respect to the State level of assistance, New York has determined a standard of need that families need to survive on. A minimum standard to survive on.

A That is correct.

Q And New York State does not pay the full amount of the assistance—90 percent of the family's need?

A Exclusive of their shelter.

Q Prior to August 6, 1971?

THE COURT: Referring to the *Rosado* case it is my recollection that New York State did pay 100 percent.

THE WITNESS: Correct.

[44A] THE COURT: The problem in *Rosado* was that Congress mandated a cost of living increase. Are you saying now that the level of benefit in dollar amounts is less than it was in—I think *Rosado* was 1969—what about it?

MR. NATHANSON: Yes, Your Honor.

THE WITNESS: I believe it was 1969.

THE COURT: And you say it is less now in dollar amounts than 1969?

THE WITNESS: Yes, I do. This was enacted by the State Legislature.

THE COURT: So the same family, a mother and three children, got \$X in 1969. Now, they get \$X minus certain factors.

THE WITNESS: Correct. Although I believe in the *Rosado* case, and I am strictly going by recollection, the standard was brought up to one level, statewide.

THE COURT: That is right. So that there were increases in some situations?

THE WITNESS: That is correct. They were brought up to the New York level.

THE COURT: That was the point in Nassau County because they had additional [45] expenses not present in New York City.

Q Prior to August 6, 1971, that is the date of the new regulation, is it not?

A I believe that is the date it was released.

Q Prior to that time could Nassau County put up a rent grant without recoupment?

A We had no requirement for recoupment or duplication.

Q It was a discretionary item on the part of the local district? The state would contribute no money for that?

A That is correct.

Q New York State receives Federal aid for the emergency assistance aid that they grant; is that correct?

A I believe so, yes.

Q Do you know what percent of it is the dollar for dollar Federal participation is on the FDC cases?

A Fifty-fifty.

Q Do you know whether emergency assistance participation is at a higher level—government participation?

A I would assume it is the same.

Q Could New York State grant emergency assistance to a recipient who is in need of a duplicate rent payment?

[46] A No. They could not. If you are talking about emergency assistance under the Emergency Assistance Program—if this is what you mean.

Q Yes.

A There is a system—

MR. NATHANSON: 350, Judge, of the Social Services Law.

THE WITNESS: You'd better read it. I am not too sure.

THE COURT: Suppose you show it to the witness.

MR. NATHANSON: All right. Yes.

Q Does the statute prohibit duplicate rent payments for rent grants already issued?

A This statute has nothing to do with the A.D.C. Program. Nothing at all.

Q Does New York State have an emergency system program with respect to A.D.C. cases?

A Not with respect to A.D.C. for children under twenty-one.

THE COURT: Is that different than F.D.C.?

THE WITNESS: It is the same thing.

Q Your contention is that the state has no assistance for children?

[47] A Yes, but not under emergency assistance.

Q Can children receiving a grant under A.D.C. also receive a grant of emergency?

A Under this section, no.

Q Under any section.

A Not if they are receiving a grant of A.D.C.

Q With respect to this duplicate grant under your 352.7(g)6, how does New York State treat the duplicate rent payment with respect to the reimbursement with respect to the Federal Government?

A We don't get reimbursement on that.

Q Prior to the effective date of this regulation did you submit it to HEW for approval?

A No. Our regulations are not submitted. Prior to implementation they are submitted. We file with the Secretary of State and it is incorporated in the state.

Q When was it submitted to HEW?

A Subsequent to its release.

Q Did the Department of Health, Education and Welfare approve the regulation?

A No.

Q Do you know the basis of the objections?

A I can't give you the citations, but they make no provisions for recoupment on the basis that it does reduce [48] assistance to the family.

Q The basis was that the recoupment reduced the level of assistance without showing available resources?

A Yes.

Q Has New York received any approval for this assistance from HEW?

A No.

Q This reduction or recoupment is not limited to cases where families had available resources?

A I don't understand.

Q Does your regulation limit recoupment to instances where the family had the full resources necessary to meet the state determined level of need?

A No.

THE COURT: The phrase is standard of need and level of benefit.

A There are loans and grants which, even now some cases and situations—for example, in the A.D.C., are identical with the standard of need.

Q With respect to the benefits of the A.D.C. program, they are to children?

A That is correct.

Q And have the children in any one of these instances where recoupment is mandated, are they guilty, [49] the children, of mismanagement?

A No.

Q They would be the innocent party?

A Yes.

Q Does New York State Social Service Department know the extent to which local districts are implementing this regulation?

A We are not asking for reports. There is no reporting requirement. I would say that the cases come to our attention in terms of requests for fair hearings; individual case situations.

Q How often do local districts have to submit reports to the state so they can get reimbursement for their expenditures?

A I believe the reports are quarterly. I am not involved with the physical submission, so I cannot be too factual to dates and requirements. There is a variety of reports. Some are submitted monthly.

Q Would you know what an RH-2 form is?

A Not offhand, no.

Q Does the local board have to keep records of duplicate payments?

A They are required to have it in their narrative report on the case.

[50] Q You mean the case record?

A Yes.

Q But they don't have to submit the number of cases where they found mismanagement and duplicated grants?

A I don't believe so.

Q Is there a limit on Federal participation where the payment to recipients are done in a restricted manner?

A Federal financial participation is not available in any month where restrictive payment exceeds 10 percent of the caseload.

Q How would that be known if there is no record of how or who is getting paid?

A They have to keep some records, but I couldn't answer. To be honest, I am not in the physical end of this.

Q Didn't you say on direct examination that the main basis of this regulation is to make sure that the restrictive payments don't exceed the 10 percent so it wouldn't be in jeopardy of loss of Federal funds?

A I am quite certain I did not. At least I don't believe so. The main basis for the regulation was to avoid abuse and the duplication of rent and poor money [51] managing.

Q With respect to that area, can you tell me what means are available to social service districts to deal with the problem of poor management on the part of recipients?

A They can become involved with caseworkers who would help them to spend their money a little more wisely. Some direction in payment of bills. If the management is so poor they could have approved payees designated.

Q What does that mean?

A It means that with the consent of the client someone else would act for the client and receive his public assistance checks and help him manage the money to help him get through the month.

Q Anything else available to the state?

A Restrictive payments.

Q Suppose you have a family and the household head cannot manage the money and this goes on for an extended period of time—perhaps a year. Anything else?

A Designation of another grantee.

Q Such as a guardianship?

A Or a wife, grandparent.

Q Is it possible the state might commence [52] neglect proceedings?

A I cannot attest to the possibility. If there was outright neglect and a child was being misused or abused, certainly some action would have to be taken.

Q Well, then to enable the family to better their management ability these are services available to local service districts?

A If you could give me a citation in 381, I would be better able to—

Q It should be around 381.4—

A Oh, yes. That is correct.

Q With respect to that aspect, before the social service district places somebody on restricted payments, are there any standards or criteria employed to determine if this is an appropriate method of payment?

A I believe the facts of the case force that decision on the basis of the information presented to the social service person.

Q There would have to be a finding that the person in fact has mismanaged?

A Certainly.

Q With respect to your regulation, it does not require any mismanagement to be found by the district, only that there be a need for duplicate rent payments; correct?

[53] A From the language of the regulation you could make that conclusion. Are you concluding that the policy is not clear?

Q I am not drawing any conclusions.

If the Social Service District were to make a loan to a recipient to cover a need is that reimbursable under the Federal program?

A I don't know how we could make a loan.

Q Loans are not reimbursable, or not permitted?

A We could only authorize payment based on the law. Issue a monthly amount to meet one of those monthly needs.

Q You have no statistics to indicate to the Court the number of times it has been implemented and the number of people affected by it?

A No.

Q With respect to this 10 percent, is that district to district, or it is 10 percent statewide?

A No. It is district to district.

Q Do you know if Nassau County exceeds the 10 percent?

A I do not know.

Q Any district?

A Yes.

Q Specifically do you know the names of the [54] districts who have exceeded this 10 percent this year?

A There is a list, but I didn't draw the list.

MR. NATHANSON: I have no further questions, Your Honor.

CROSS-EXAMINATION

BY MR. GALLAGHER:

Q From your reading of this regulation is there anything that prevents making a payment for a lost cash

grant that might have been used for grant and then recouping it?

Is there anything in the language that would not allow such a procedure as followed by Nassau County in some instances?

A No; but in 352.7(g)6 there is no provision for recoupment for theft.

Q But in 352.7(g)6 it is not a mandatory payment that has to be made, but rather at the discretion of the local Social Services Department as to whether a payment could be made in such a situation?

A Yes, that is correct.

Q Let me ask you this: On a payment under 352.7(g)6 is a payment such as that reimbursable by the state?

A No.

[55] Q Is it correct to assume that the county would get the money back by recoupment and the state doesn't really come in?

A Correct.

Q So is there any need for the county to file a report on these cases when situations under 352.7(g)6 arise? Is there anything that would require the county to tell you when they make a grant under this?

A Not to my knowledge. Of course, any case activity must be reported. Any expenditure has to be reported.

Q You said something before about a narrative report that the county has to file. What is that about?

A That is the case report which is a combination. In some agencies they are separated. There is one social services report and monthly payment report. Within this file there has to be a reporting of the activity on the case.

Q On each case?

A Every case.

Q That goes to the state?

A No.

THE COURT: It is a file telling about the case.

THE WITNESS: That is correct. And it [56] is subject to review by our field people.

Q Are you aware of the fact situations involved in this case—the five people?

A No, I am not.

Q Well, in one case, under this regulation, the county attempted to recoup just about the entire amount of the advance within one month. Is there anything in 352.7 (g)6 which would prevent them from taking it all back in one month? This is the case of Hagana.

THE COURT: In other words, recoupment was going to take almost the whole thing for six months. It had to recoup some \$250.

THE WITNESS: It cannot exceed six months, and the intent was that it was to be spread to reduce the amount of decrease in subsequent checks.

MR. GALLAGHER: I have nothing further.

THE COURT: Anything further, gentlemen?

MR. GALLAGHER: No, I am through, Your Honor.

MR. NATHANSON: I have nothing further Your Honor.

MR. COLODNER: Nothing further, Your Honor.

[57] THE COURT: Both sides rest? No further witnesses?

MR. NATHANSON: I do have someone from the county. If you want some information as to how it is being implemented.

THE COURT: You tell me the specific information you expect to elicit.

MR. NATHANSON: Well, actually, I did subpoena him, but I don't think it will help, because he has no statistics. I really see no reason for him to testify.

THE COURT: I have no idea of the number of cases—

MR. GALLAGHER: On the question of how the payments were made in Nassau County before the enactment of this regulation maybe Mr. Barry could be of some help.

THE COURT: All right. Call him as a witness.

TESTIMONY OF JOSEPH BARRY

JOSEPH BARRY, being first duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GALLAGHER:

[58] Q What is your full name, please?

A Joseph Barry.

Q What is your address?

A 141 Beach Street, Valley Stream.

Q What is your position?

A I am director of the Social Services Center, Nassau County Department of Social Services.

Q How long have you been doing that type of work?

A Since 1951.

Q Are you familiar with the New York State regulation, 352.7(g) 6?

A I am.

Q Under this regulation do you see any limit on what type of a—

MR. GALLAGHER: Withdrawn.

Q (Cont'g.) Has it been the policy of the local department to give assistance on grounds other than mismanagement and also with regard to recoupment of that assistance, is there any limit as far as you can see as to what grounds a person must have regarding inability to pay their rent?

A Our interpretation is that where there is to be an eviction for non-payment of rent we can make up the [59] payments, but it must be recouped over not more than a period of six months.

THE COURT: What happened when someone was evicted?

THE WITNESS: We had a growing problem in Nassau County with the growing increase of motel population. It has been within the last year that we have been

able to reduce the motel population. We are trying to keep it at that reduced amount.

THE COURT: What you did then, was you did not make duplicate payments. There was an eviction. You waited for the eviction and then these people were put up in hotels; I assume at a much higher cost—

THE WITNESS: Either that or relocating.

THE COURT: So until that point you never paid the landlord, so that tenant still owes the landlord for rent?

THE WITNESS: Many landlords will not accept a voucher payment. We have that problem that we are working with today.

BY MR. GALLAGHER:

Q Am I correct in assuming that before the [60] passage of this regulation in 1971, that if a person was unable to pay the rent, for whatever reason, there was no way that the County would pay the rent?

A That's correct. We assist the client to get other housing or utilize the community resources to meet the need of the eviction.

BY MR. NATHANSON:

Q With respect to those clients whom the County houses in motels—the county pays for the cost of that?

A That is correct.

Q Directly to the owner of the motels?

A Yes.

Q When a county does that it often is for duplicating a rent payment that has been made?

A In other words, you are saying that the client is in the motel because they didn't make rent payments? Yes. That is possible.

Q Does the State require recoupment for rent payments?

A No.

THE COURT: In other words, a recipient of a shelter allowance of \$175 and who was evicted, you might take that [61] same family and pay \$400 a month in a motel, but no recoupment?

THE WITNESS: That is correct.

Q I would like to ask you a question with respect to emergency assistance.

A Yes.

Q Is it available to A.D.C. cases?

A No.

Q Can a social service department under 352.7(g)6 of the regulations issue emergency assistance to meet the needs of this rent need?

A It is not maintainable.

Q Why is that?

A If I understand the regulations, this is not considered an emergency need, in accordance with that regulation and therefore cannot be met.

THE COURT: In other words, once you are in a dependent child program that is supposed to take care of the needs of those children?

THE WITNESS: That is correct.

Q Are you aware of the number of cases that are on restricted payments?

A No; I am not. That is an accounting function.

[62] Q Do you have any statistics to help the Court with the number of recipients in Nassau County who are getting this type of assistance?

A Not exact figures. I believe we had this program presented to maybe 25 or 50 persons since we implemented it, and we have no way at the present time of determining who those individuals are.

THE COURT: How many families are in the A.D.C. program in Nassau County?

THE WITNESS: Approximately 13,000.

Q How many is that in individual people?

A 39, 40,000, maybe more.

Q Do you have any knowledge of the number of A.D.C. cases statewide?

A No, I don't.

MR. NATHANSON: I have no further questions.

THE COURT: Mr. Nathanson, after you have had an opportunity to read Mr. Colodner's brief, which I read over the weekend, then let me know. As I say, I have in mind the urgency of the situation and I wish to decide

these cases quickly. I had hoped to decide [63] this case by next Monday, if I can. If I can decide it sooner, I will. As I say, I want to give either side the chance to take up the issues.

MR. NATHANSON: We did cite in our supplemental brief a case subsequent to *Dandridge*—a three judge court—same issues—and I am not sure whether or not we require additional time to brief it.

THE COURT: If you are talking about the argument in the Illinois case—I believe it is—in the latest test brief, I haven't read that because I just got that.

MR. NATHANSON: *Bradford v. Juras*—a three judge court, subsequent to *Dandridge*.

THE COURT: If either or any of the lawyers want to submit briefs, I suggest you call my office and say you would like a day or two. It doesn't have to be a heavy or weighty brief in ounces or pounds, just direct my attention to the cases. That is if you want additional time.

However, I don't think I can decide this before, at the very earliest, Wednesday [64] or Thursday. If you have nothing further to submit, then you may call my office and say, I have found nothing.

MR. NATHANSON: The restraining order is to continue?

THE COURT: Yes, until the filing of a decision on the merits of this trial.

Anything else?

MR. GALLAGHER: I have nothing further, Your Honor.

MR. NATHANSON: Nothing further, Your Honor.

MR. COLODNER: No, I have nothing, Your Honor.

THE COURT: All right.

Thank you, gentlemen.

IN UNITED STATES DISTRICT COURT

72-C-182

[Title Omitted]

MEMORANDUM OF DECISION

March 8, 1972

This class action challenges the validity of § 352.7(g) (6) of Title 18 of the New York Code of Rules and Regulations which became effective on August 6, 1971.¹ Plaintiffs claim that the provision in the regulation directing recoupment from subsequent grants, thereby reducing the payments made to recipients, violates the recipients' constitutional right to equal protection of the laws and is violative of the provisions of § 602(a) (7) and (a) (10) of the Social Security Act (42 U.S.C. §§ 602 (a) (7) and 602(a) (10) and the requirements in 45 CFR § 233.20(a) promulgated by the Secretary of Health, Education and Welfare.

Plaintiffs moved for the convening of a three judge district court. On the return day of the motion, plaintiffs withdrew the application. The parties thereupon consented to an early trial on the merits of the statutory claim by a single district judge.² The trial was had to

¹ § 352.7(g) (6) of the regulations promulgated by the New York State Department of Social Services provided the following: "(6) For a recipient of public assistance who is being evicted for non-payment of rent for which a grant has been previously issued, an advance allowance may be provided to prevent such eviction or rehouse the family; and such advance shall be deducted from subsequent grants in equal amounts over not more than the next six months. When there is a rent advance for more than one month, or more than one rent advance in a 12 month period, subsequent grants for rent shall be provided as restricted payments in accordance with Part 381 of this Title."

² The Court at that time issued a temporary restraining order directing payment of public assistance benefits without the deductions mandated under § 352.7(g) (6) and providing that the time limitation set forth in the said regulations be extended for the period of the stay.

the court without a jury. The parties stipulated to most of the facts at the time of trial. (See stipulation dated February 23, 1972).

Regional Commissioner of HEW, Elmer W. Smith, in answer to a plan submitted which incorporated the New York State Department of Social Services' proposed regulation which ultimately became section 352.7(g)(6), advised the defendant Wyman that "in accordance with federal policy such subsequent deductions may be taken only if such funds are available. Our reference is Federal Program regulation 20-7-Item (3)(ii)(c) and (d). As presently written regulation 352.7(g) therefore does not meet federal requirements."

The letter of December 29, 1971, written by Regional Commissioner Smith to the defendant Wyman is set out in full as follows:

"Mr. George K. Wyman, Commissioner
N.Y. State Dept. of Social Services
1450 Western Avenue
Albany, N.Y. 12203

Re: Plan Submittal 71-68
(Standard of Assistance)

Dear Commissioner Wyman:

On November 15, 1971 we wrote you with reference to Submittal 71-61 advising that Regulation 352 g (6), cited as 352 g (7), in providing for deductions from subsequent grants of funds duplicated to avoid eviction is contrary to Federal Program Regulation 20-7. We would like to bring to your attention that Submittal 71-68 continues the cited provision now in Regulation 352 g(7) and adds a new subdivision (g) 5 of Regulation 352, which has the same deficiency relative to subsequent deductions of duplicated payments.

We have noted that in these two citations restrictive payments 'may' be made of subsequent grants. Regulation 352.7 (g) (1) providing for the handling of rent payments subsequent to fraudulent claims of

non receipt of checks also indicates use of a restrictive payment. As you know, restrictive payments are not subject to Federal participation unless they fall within the Federal program guides in Regulations 20-4 and 20-5. (Protective Payments).

If it is felt that discussion of any of the foregoing is indicated, staff of the Regional Office is available.

Sincerely yours,

ELMER W. SMITH
Regional Commissioner"

The threshold question is the jurisdiction of this court to decide the statutory claim. The defendants argue that the constitutional claim is frivolous and that it, therefore, cannot be the basis for pendent jurisdiction. The court finds that the constitutional claim charging a violation of the equal protection clause of the Fourteenth Amendment is substantial. In *Bradford v. Juras*, 331 F. Supp. 167 (D.Ore. 1971) a three-judge district court noted that it considered both the constitutional and statutory claims in a challenge to a similar state regulation. The court decided the case on the statutory claim and did not reach the constitutional issue. *Rosado v. Wyman*, 397 U.S. 397, 90 S.Ct. 1207 (1970). The question as to whether a challenge to state provisions contravening the AFDC requirements of the Social Security Law based solely on the statutory claim "may be brought in federal courts." *King v. Smith*, 392 U.S. 309, 312, n.3, 88 S.Ct. 2128, 2131 (1968) under 28 U.S.C. § 1343(3)* was left

* "§ 1343. Civil rights

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * *

(3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

open. It was again noted in *Rosado* (U.S. at p. 405, n. 7, S.Ct. at p. 1214).

The AFDC Program was established in the Social security Act of 1935, 42 U.S.C. § 601, et seq. It "... is based on a scheme of cooperative federalism." *King v. Smith, supra*, U.S. at p. 316, S.Ct. at p. 2133. The states are not required to participate in the program but having elected to do so they "must comply with the terms of federal legislation." *Rosado v. Wyman, supra*, U.S. at p. 408, S.Ct. at p. 1216. Under the Social Security law the participating states must submit an AFDC plan for approval of the Secretary of HEW, 42 U.S.C. § 602(a) (15).

New York State participates in the Federal program of Aid to Families with Dependent Children (AFDC) as do all the other States of the Union, the District of Columbia, Puerto Rico and the Virgin Islands. New York's plan for Aid to Dependent Children (ADC) is embodied in § 131(a) of the Social Services Law of the State of New York. That statute provides for a schedule of payments to families with dependent children based on the number of individuals in the household. The standard of need is that sum of money required to sustain life, including food, clothing, utilities, furniture, household supplies, laundry, personal expenses and transportation, but exclusive of shelter and fuel. The level of benefits fixed by § 131(a) is at 90% of the statewide standard of need. The program is administered locally and in Nassau County by the Nassau County Department of Social Services.

The program is funded by grants equal to 50% from the Federal government, 25% from the State and 25% from the County. Under the regulations of the Department of Social Services (18 N.Y.C.R.R. § 352.3), each social service department fixes a maximum monthly rent allowance schedule. Both the allowance for basic needs and the allowance for rent are paid monthly in one check, except in those cases where the local social services department elects to make direct payments for rent.*

* The department of Health, Education and Welfare regulations

42 U.S.C. § 602(a)(10) requires New York State to furnish aid "to all eligible individuals". The program's aims and goals are set forth in 42 U.S.C. § 601. It encourages the maintenance of a family unit where dependent children are deprived of support and encourages the States to furnish financial assistance to such families for the "maintenance of continuing parental care and protection . . ." The need for payments at whatever level of benefit the State establishes for current use is obvious. The Secretary promulgated a regulation requiring that in establishing financial eligibility and the amount of the assistance payment, the regular payments would not be reduced because of a prior overpayment. The Rule provides in part as follows:

"A State Plan for OAA, AFDC, AB, APTD or AABD must, as specified below:

* * * *

(3) (ii) Provide that, in establishing financial eligibility and the amount of the assistance payment:

* * * *

(c) only such net income as is actually available for current use on a regular basis will be considered; (d) current payments of assistance will not be reduced because of prior overpayment unless the recipient has income or resources currently available in the amount by which the agency proposes to reduce payment; . . ." (Emphasis supplied).

The view of the Secretary concerning the interpretation and effect of its own regulation is entitled to weight. *Zemel v. Rusk*, 381 U.S. 1, 11, 85 S.Ct. 1271, 1278 (1965), *Rosado v. Wyman*, *supra*, U.S. at pp. 406-407, S.Ct. at p. 1215.

The three cases decided in other circuits concerning similar regulations were brought to the court's attention.

discourage direct payments by limiting the number of direct payments to third parties to not more than 10% of the cases receiving payments under AFDC statewide. 45 CFR § 234.60(b)(2).

In *Cooper v. Laupheimer*, 316 F. Supp. 264 (E.D.Pa. 1970) and *Bradford v. Juras*, 331 F. Supp. 167 (D.Ore. 1971), three-judge courts found similar state regulations violative of the Social Security Act. In *Acosta v. Swank*, 312 F. Supp. 766 (N.D.Ill. 1970), a three-judge court came to a different result. However, on a motion to re-argue the court considered a brief of HEW and was there advised that it was the opinion of the Secretary of HEW that the challenged state regulation was inconsistent with 42 U.S.C. § 602(a) (7) and 45 CFR § 233.20 (a) (3) (ii) (c). The court was further advised that the State of Illinois "changed its policy with respect to 'duplicate assistance' so as to conform with the aforesaid HEW regulation . . ." *Acosta v. Swank*, 318 F. Supp. 1348, 1349 (N.D.Ill. 1970). The court then remanded the case to a single district judge to determine whether the plaintiffs were entitled to 'retroactive benefits' because of the deductions made pursuant to the invalid regulation. The regulation that grants duplicate payments for rent where a recipient of AFDC assistance is threatened with eviction providing for recoupment out of current benefits is void. The court declares that 18 N.Y.C.R.R. § 352.7(g) (6) contravenes the Social Security Act and the regulations promulgated thereunder. A permanent injunction may issue enjoining the defendants from attempting to recoup such duplicate payments by reducing current AFDC payments.

This memorandum of decision contained findings of fact under Rule 52.

Settle judgment in accordance with this memorandum of decision on two days' notice.

JACOB MISHLER
U. S. D. J.

IN UNITED STATES DISTRICT COURT

72-C-182

[Title Omitted]

MEMORANDUM OF DECISION ON SETTLEMENT OF JUDGMENT

March 14, 1972

Plaintiffs and defendants submitted proposed judgments as directed in the court's memorandum of decision dated March 3, 1972. Plaintiffs' proposed judgment directs payment of all monies wrongfully withheld pursuant to § 352.7(g)(6) of Title 18 of The New York Code of Rules and Regulations. Plaintiffs' proposed judgment would make the judgment retroactive to the date of the promulgation of the invalid regulation, i.e., August 6, 1971. Defendants' proposed judgment would limit retroactivity to the date of the issuance of the temporary restraining order which directed payment of AFDC benefits without the deduction mandated by § 352.7(g)(6).¹

The court has no information as to how many recipients are affected by this determination, either county- (Nassau County) or state-wide; it has no information as to the financial burden retroactive payments would have on the county or state.²

The plaintiff class is defined as all recipients of benefits under Aid to Families with Dependent Children (AFDC)³ whose grants are threatened with reduction pursuant to § 352.7(g)(6).

AFDC was established to provide grants to *children* for current needs. It was not intended to be used as a form of damages for past deprivations. The difficulty in denying retroactivity to plaintiffs is the questionable good

¹ The T.R.O. was signed February 18, 1972. The action was commenced by the filing of a complaint on February 10, 1972.

² The court made inquiry on the issue during the trial. Defendants' witnesses were unable to supply the answers.

³ The state describes the program as Aid to Dependent Children (ADC).

faith of the state⁴ in promulgating § 352.7(g) (6). The state promulgated the regulation after having been advised by the Regional Commissioner of H.E.W. that the regulation as then proposed did not meet federal requirements. However, on the other side of the ledger are varied and complex questions as to the fault of the parent in the management of the proceeds of AFDC monthly grants.⁵ If the right to retroactive benefits is discretionary with the court as suggested in *Robinson v. Hackney*, 307 F.Supp. 1249, 1257 (S.D. Texas—three-judge court 1969), then the fault of the class must be considered as well as the bad faith of defendants. See also *Machado v. Hackney*, 299 F.Supp. 644, 646 (W.D. Tex. 1969).⁶

Three-judge courts in the District of Connecticut have directed retroactive payments to recipients of benefits under AFDC upon finding state court regulations invalid: In *Thompson v. Shapiro*, 270 F.Supp. 331, 338 (D.Conn. 1967),⁷ the court struck down a regulation requiring a one year residence in order to qualify for AFDC benefits. The court granted judgment “. . . awarding plaintiff money unconstitutionally withheld” The affirming opinion did not discuss the issue of retroactivity. 394 U.S. 618, 89 S.Ct. 1322 (1969). In *Doe v. Shapiro*, 302 F.Supp. 761, 768 (D.Conn. 1969)—overturning a regulation terminating benefits upon the refusal of a mother to name a putative father—and *Solman v. Shapiro*, 300 F.Supp. 409 (D.Conn. 1969)—overturning a requirement that determinations of need consider the income of a stepfather—the court referred the issue of the amount of the back payment to be made to the Department of Welfare of the State of Connecticut.

⁴ *Baxter v. Birkins*, 311 F.Supp. 222 (D.Colo. 1970), directed retroactive effect even where the state acted in good faith in promulgating a regulation requiring a one year residence for AFDC.

⁵ The named plaintiffs are without fault. Fault, however, was not an element in determining the class or exclusion from the class.

⁶ *Machado v. Hackney* applied the determination retroactively to the named plaintiffs only, and prospectively to all the other members of the class.

⁷ A dissenting opinion was written by Judge Clarie.

Westberry v. Fisher, 309 F.Supp. 12 (D.Me. 1970), and *Acosta v. Swank*, 325 F.Supp. 1157 (N.D.Ill. 1971), held that retroactivity is barred by the Eleventh Amendment. Those decisions found that the claim for retroactive payment was in fact an action by a citizen against the state for damages—an action not maintainable under the Eleventh Amendment without the consent of the state.

In *Rosado v. Wyman*, 322 F.Supp. 1173, 1196 (E.D. N.Y. 1970), giving prospective direction to its order, the court noted the heavy financial burden on the state if the order were retroactively applied. The financial and administrative burden was also considered in *Machado v. Hackney*, *supra*, and *Robinson v. Hackney*, *supra*.

The right of AFDC recipients is to be treated fairly and equally with other eligible recipients as provided by the Fourteenth Amendment in the distribution of government funds for the purpose of satisfying the current needs. The failure of the government, either state or federal, to provide funds does not create a right of recovery. The award of funds over current needs might very well discriminate against other recipients who receive less than current needs. The level of benefits under the ADC program is fixed at 90% of the standard of need. In balancing the equities which on the one hand takes into account the bad faith of the state, and the other hand the fault of a substantial number of the class to be benefited, the financial and administrative burdens imposed on the state and the cost which ultimately must be borne by the taxpayer, the factors weigh heavily against granting a windfall to the plaintiffs in the form of retroactivity.*

The court has this day signed the judgment proposed by Joseph Jaspan, County Attorney of Nassau County, attorney for the defendant James M. Shuart.

JACOB MISHLER
U. S. D. J.

* As has been noted, February and March 1972 payments will be made under the T.R.O. issued on February 18, 1972. To that extent the class has received retroactive benefits as of the date of the institution of the action.

IN UNITED STATES DISTRICT COURT

72 Civ. 182

[Title Omitted]

ORDER AND JUDGMENT

This cause came on to be heard on plaintiffs' motion, pursuant to Rule 65 of the Federal Rules of Civil Procedure, for a preliminary injunction enjoining the defendants from enforcing and implementing § 352.7(g)(6) of Title 18 of the New York Code of Rules and Regulations and for the convening of a three-judge statutory court, pursuant to Title 28 U.S.C. §§ 2281 and 2284, and plaintiffs in open court having withdrawn their application for the convening of a three-judge statutory court; and the Court having found plaintiffs' constitutional claim under the Equal Protection Clause of the Fourteenth Amendment to be substantial; and the plaintiffs having consented to the determination of the statutory claim by the Court; and upon the consent of all the parties in open court, the hearing of the application for a preliminary injunction was advanced and consolidated with a trial of the action on the merits, pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure; and the Court having given the matter due deliberation;

Upon the pleadings, affidavits and briefs submitted to date, the stipulation of the facts by the parties dated February 28, 1972, the testimony taken in open court, and the memorandum decision of the Court dated March 3, 1972, containing findings of fact pursuant to Rule 52 of the Federal Rules of Civil Procedure, this Court having found in said decision that § 352.7(g)(6) of Title 18 of the New York Code of Rules and Regulations, by requiring that duplicate payments of rent for ADC recipients who are threatened with eviction be recouped by reducing current payments without regard to the current availability of income or resources, contravenes the Social Security Act and the regulations promulgated thereunder, it is

ORDERED, ADJUDGED AND DECREED that pursuant to Rule 23 of the Federal Rules of Civil Procedure, this action is properly maintainable as a class action and that the class represented by plaintiffs herein consists of all recipients of public assistance in the Aid to Dependent Children category in New York State whose grants are threatened with reduction by the implementation of § 352.7(g)(6) of Title 18 of the New York Code of Rules and Regulations; and it is further

ORDERED, ADJUDGED AND DECREED that plaintiffs' motion for a permanent injunction be granted; and it is further

ORDERED, ADJUDGED AND DECREED that § 352.7(g)(6) of Title 18 of the New York Code of Rules and Regulations is hereby declared to be in violation of the Social Security Act and the regulations promulgated thereunder by the Secretary of Health, Education and Welfare in that § 352.7(g)(6) improperly requires that duplicate payment for rent to prevent eviction of a recipient of ADC be recovered by reducing current benefits without regard to current availability of resources or income; and it is further

ORDERED, ADJUDGED AND DECREED that the defendants, their successors in office, agents and employees, and all persons in active concert and participation with them, including local social service officials administering the Aid to Families with Dependent Children program under state supervision be, and hereby are, permanently enjoined from enforcement or implementation of § 352.7(g)(6) of Title 18 of the New York Code of Rules and Regulations; and it is further

ORDERED, ADJUDGED AND DECREED that defendants reimburse all ADC recipients in the state who have had part of their grant recouped pursuant to 18 NYCRR § 352.7(g)(6) during the months of February and March, 1972, for the amount recouped during those months.

ENTER

/s/ Jacob Mishler
Judge, U. S. D. C.

March 14, 1972

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-first day of March, one thousand nine hundred and seventy-two.

CYNTHIA HAGANS, for herself and her two infant children, KIMBERLY and KOREY; BERTHA GRISSETT, for herself and her five infant children, DEBORAH, ANGELO, WILLIAM, LINDA and CYNTHIA; KATHRYN ZAVERZENEC, for herself and her infant child, DANA LYNN; KAREN HORNECK, etc.; EURLEEN CARSON, etc. and all other persons similarly situated, PLAINTIFFS-APPELLEES

v.

GEORGE K. WYMAN, as Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, as Commissioner of the Nassau County Dept. of Social Services, DEFENDANTS-APPELLANTS

It is hereby ordered that the motion made herein by counsel for the appellants by notice of motion dated March 16, 1972, for a stay be and it hereby is granted.

It is further ordered that the appellants shall file their brief on or before March 27, 1972; that the appellees shall file their brief on or before March 31, 1972 and that all parties may file typewritten papers.

It is further ordered that this argument of the appeal shall be heard during the week of April 3, 1972.

A. DANIEL FUSARO
Clerk

BEFORE: HON. PAUL R. HAYS
HON. WALTER R. MANSFIELD
HON. WILLIAM H. MULLIGAN
Circuit Judges

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 72-1327

[Title Omitted]

OPINION AND DISSSENTING OPINION OF COURT OF APPEALS

Before: CLARK, Associate Justice,* LUMBARD, Senior
Circuit Judge and TYLER, District Judge.**

Appeal from an order of the United States District
Court for the Eastern District of New York, Jacob Mish-
ler, Chief Judge, permanently enjoining appellants from
implementation or enforcement of § 352.7(g) (7) of Title
18, New York Code of Rules and Regulations.

Order vacated and case remanded for further proceed-
ings.

CARL JAY NATHANSON, (Nassau County Law Services
Committee, Inc., Westbury, New York) for Plain-
tiffs-Appellees.

MICHAEL COLODNER, Asst. Atty. Gen. (Samuel A. Hirsh-
witz, First Asst. Atty. Gen. and Louis J. Lefkowitz,
Atty. Gen., State of New York, of counsel), for
Defendant-Appellant Wyman.

* Retired Associate Justice of the Supreme Court, sitting by
designation.

** Of the District Court for the Southern District of New York.
Sitting by designation.

TYLER, D.J.

This is a class action in which plaintiffs-appellees challenge the validity of 18 N.Y.C.R.R. § 352.7(g) (7),¹ a regulation promulgated by the New York State Department of Social Services. Defendants-appellants, Commissioners of the New York State and Nassau County Departments of Social Services (hereinafter collectively, the "state") appeal from an order of the District Court for the Eastern District of New York which declared § 352.7(g) (7) void and enjoined defendants from implementation of enforcement thereof. We conclude that issues relating to the validity of § 352.7(g) (7) were not raised by the stipulated facts presented at trial and that the order must therefore be vacated and the case remanded for further consideration.

Prior to the enactment of the regulation in question, the state was without authority to advance funds to welfare recipients who, having mismanaged their grants, were unable to keep current in their rent payments. To prevent evictions and the resultant necessity and expense of relocations and/or housing welfare recipients in motels, § 352.7(g) (7) was enacted on August 6, 1971. This regulation authorizes the state to advance to welfare recipients faced with eviction funds to which they will become entitled in the future and with which they can pay rent currently due. To husband funds and discourage mismanagement, § 352.7(g) (7) further provides that such monies as are advanced to forestall eviction shall be deducted from subsequent grants over the following six months, recouped by the state and presumably disbursed to other welfare recipients.

¹ The regulation in question, cited by the parties and the court below as 18 N.Y.C.R.R. § 352.(g) (6) was renumbered 18 N.Y.C.R.R. § 352.7(g) (7) effective December 10, 1971. § 352.7(g) (7) provides in pertinent part:

"For a recipient of public assistance who is being evicted for non-payment of rent for which a grant has been previously issued, an advance allowance may be provided to prevent such eviction or rehouse the family; and such advance shall be deducted from subsequent grants in equal amounts over not more than the next six months."

The representative plaintiffs, five mothers and their twelve children, receive monthly Aid to Families with Dependent Children (AFDC) grants calculated to provide 90% of their familial sustenance needs. Each plaintiff, for various reasons,^{*} was unable to pay her rent, and thus was served with an eviction notice by her landlord.

To prevent the evictions and to avoid housing plaintiffs in motels, the state paid plaintiffs' rent arrearages directly to the landlords. These sums were considered as "advances" by the state, which, pursuant to 18 N.Y.C. R.R. § 352.7(g) (7), deducted or "recouped" them from subsequent grants. Appellees complain that recoupment, which in some cases has drastically reduced their grants, penalizes their children for their parental misfeasances and thus contravenes §§ 602(a) (7) and (a) (10) of the Social Security Act, 42 U.S.C. §§ 602(a) (7) and (a) (10), and is an impermissible reduction in an AFDC grant under 45 C.F.R. § 233.20(a).

Appellees eschewed a three judge court, 29 U.S.C. § 2281, and the parties proceeded on stipulated facts to an expedited trial. Rule 65(a) (2), F.R.Civ.P. After expert testimony was heard on the policy and intent of § 352.7(g) (7), the court found jurisdiction under the equal protection clause of the Fourteenth Amendment and determined that the case was properly maintainable as a class action. The court then held [by virtue of its pendent jurisdiction of the statutory claim] that § 352.7(g) (7) violated the Social Security Act and federal regulations enacted thereunder. The state was enjoined from implementation or enforcement of the recoupment regulation and ordered to reimburse appellees for funds which had been deducted.

^{*} Cynthia Hagans paid \$200 a month for her apartment while receiving \$165 a month for rent. She was simply unable to make up the \$35 a month difference with money allocated for other needs. Bertha Grissett was unable to pay her rent after the proceeds of her check was stolen. She apparently has had her recoupment reimbursed. Kathryn Zaverzence and Karen Horneck expended their rent money for babysitters and transportation while looking for alternative housing. Eurlen Carson mistakenly believed that her rent was being paid directly to her landlord.

Appellants' principal argument on appeal is that because appellees' right to AFDC grants is "... dependent for its existence upon the infringement of property rights", *Hague v. C.I.O.*, 307 U.S. 496, 531 (1939), jurisdiction may not be found under 28 U.S.C. § 1343(3). *Eisen v. Eastman*, 421 F.2d 560 (2d Cir., 1969). The Supreme Court, however, has just laid to rest "... the distinction between personal liberties and proprietary rights as a guide to the contours of § 1343(3) jurisdiction. *Lynch v. Household Finance Corp.*, — U.S. — (No. 70-5058, U.S. Supreme Court, March 23, 1972) slip opinion at 4. This being so, there is jurisdiction of the instant case under 28 U.S.C. § 1343(3). *Carter v. Stanton*, — U.S. — (No. 70-5082, U.S. Supreme Court, April 3, 1972); *McClendon v. Rosetti*, — F.2d —, (No. 71-1890, 2d Cir., April 12, 1972).

Nevertheless, we conclude that the case must be remanded to permit the trial court to consider certain facts and issues which, as counsel effectively conceded on oral argument, were not brought to its attention. The record, constructed on an expedited basis on stipulated facts and limited testimony, unfortunately contains only fleeting and elliptical references to "fair hearings", despite the fact that New York is constitutionally, as well as by its own regulations, required to afford welfare recipients notice and an opportunity to be heard before their benefits may be "terminated, suspended, or reduced." *Goldberg v. Kelly*, 397 U.S. 254 (1970); 18 N.Y.C.R.R. § 351.26. Although there are indications that none of the named plaintiffs received hearings concerning recoupment of funds advanced to them,³ the parties have not addressed themselves to the question of what impact, if any, the "fair hearing" mandated by 18 N.Y.C.R.R. § 351.26 might have upon New York recoupment procedures. Accordingly, there remain unconsidered issues which must

³ Plaintiffs Hagans and Grissett neither requested nor received hearings. Mrs. Zaverzence received notice of hearing, but claims that the departmental representative refused to see her on the appointed date. Mrs. Horneck's request for a hearing was refused. It is not clear whether Mrs. Carson, who signed a consent to recoupment, received a hearing or not.

be resolved before the state may be permanently enjoined from implementing advance rent payments and enforcing recoupment thereof pursuant to § 352.7(g) (7).

The first issue which must be considered is whether notice and hearings are plaintiffs' due in this case. In order to make this determination, it must be decided whether recoupment of past advances from current grants is a "reduction in grant" so as to bring into effect New York fair hearing procedures. 18 N.Y.C.R.R. § 351.26.

If it be determined that plaintiffs have actually sustained a reduction in grant, any recoupment in the absence of notice and hearings would work a denial of due process of law to plaintiffs. *Goldberg v. Kelly, supra*. The state, in such event, would be obliged to refund recouped funds and to refrain from enforcement or implementation of 18 N.Y.C.R.R. § 352.7(g) (7) unless and until fair hearings are provided.

Until the question of fair hearings is resolved, it is premature to permanently enjoin implementation of § 357 (g) (7). Since it is not yet clear how the state will interpret or implement its recoupment regulation, there is "... the need for some further procedure, some further contingency of application or interpretation whether judicial, administrative or executive . . . to make [ripe] the issue sought to be presented to the Court." *Poe v. Ullman*, 367 U.S. 497, 528 (1961), [Harlan, J., dissenting]. Accordingly, before holding state and federal welfare regulations in conflict, "... the appropriate course is to withhold judicial action pending reprocessing, [under New York fair hearing procedures], of the determinations here in dispute." *Richardson v. Wright*, 405 U.S. 208, 209 (1972).

One other problem inherent in this litigation deserves identification and consideration. It might be argued that recoupment does not entail a "reduction in grant", since only advanced funds are deducted and thus, the grant, over a six month period, would remain constant. If the trial court were persuaded by such an argument, the state might not be under any obligation to provide hearings prior to recoupment. That conclusion would not necessarily require judgment for plaintiffs, for if one were

to assume that there was no reduction in grant entailed by New York's recoupment of rent advances, the question would remain as to whether or not § 352.7(g) (7) was in conflict with Subchapter IV of the Social Security Act, 42 U.S.C. § 601 *et seq.* See *Dandridge v. Williams*, 397 U.S. 471 (1970), or HEW regulations enacted thereunder.⁴

The order of the District Court is vacated and the case remanded for further consideration in light of the matters heretofore discussed.

LUMBARD, Circuit Judge (dissenting):

I dissent and vote to reverse.

I fail to understand what purpose will be served by remanding this case to the district court for its consideration whether the plaintiffs were entitled to a hearing under the rule of *Goldberg v. Kelly*, 397 U.S. 254 (1970). In *Goldberg*, the question was whether certain individuals were eligible for welfare benefits and there were factual disputes over their eligibility. Here there are no disputed facts. The statute provides that the state may advance welfare payments and, if it does so, that it shall recoup them over a six-month period. Hearings would be necessary only if the state allowed exceptions to this rule and the plaintiffs wished to prove that they were within the excepted class. The statute permits no such exceptions.

On the merits, I think the New York statute a valid exercise of the state's power to make regulations governing the payment of welfare grants. Plaintiffs have argued that the New York statute is in conflict with 42 U.S.C. § 1302 and particularly the HEW regulation, 45 C.F.R. § 233.20(3) (ii), promulgated thereunder. However, these federal laws prescribe welfare eligibility re-

⁴ For example, 45 C.F.R. § 233.20(a) (3) (ii) (d) provides:

"current payments of assistance will not be reduced because of prior overpayments unless the recipient has income or resources currently available in the amount by which the agency proposed to reduce payment." [emphasis supplied]

quirements, while the New York statute is directed not at eligibility (which the state determines according to the applicable federal standards), but at the method of payment of concededly due welfare grants. Nothing in the governing federal statute bars the state from accelerating welfare payments in one month and then reducing subsequent monthly grants. To hold otherwise would mean that the state either would have to forego programs of the nature at issue in the instant case or would have to make double payment to welfare recipients who had mismanaged their grants. The first course would be inhumane; the second an improvident allocation of the state's limited resources. Neither is required by the federal law.

I would reverse the judgment of the district court and direct that judgment be entered for the defendants and that the injunction be vacated.

IN THE UNITED STATES DISTRICT COURT

AFFIDAVIT

BARBARA SEEMILLER, being duly sworn, deposes and says:

1. That she resides at 33 New Avenue, Yonkers, New York with her child, Karin, age three.
2. That she is a recipient of Aid for Dependent Children benefits for herself and child from the Westchester County Department of Social Services and was a recipient of public assistance at all times hereinafter mentioned.
3. That the deponent rents the premises located at 33 New Avenue at a monthly rental of \$130.00.
4. That deponent became in arrears of rent owed for the months of March and April, 1972.
5. That deponent had insufficient income to pay this rent arrearage and also to meet her other needs.
6. That in May, 1972, deponent requested that the Westchester County Department of Social Services pay the rent arrearage in order that deponent could retain possession of her apartment.
7. That on May 17, 1972, the Westchester County Department of Social Services advised deponent by letter that it would authorize two months back rent in the amount of \$260.00. This letter also informed deponent that the money so authorized would be recouped from future grants effective July 1, 1972 through December 31, 1972 at the rate of \$43.33 per month. Attached hereto and marked as deponent's exhibit A is a copy of this letter.
8. That on May 17, 1972, deponent also received from the Westchester County Department of Social Services a document entitled Notice to Reduce Public Assistance which stated deponent's public assistance grant would be reduced from \$251.00 monthly to \$209.70 because deponent received duplicate rent money in the amount of \$260.00 to cover rent for March and April. Attached hereto and marked as deponent's exhibit B is a copy of this notice.

9. That on or about May 17, 1972, the Westchester County Department of Social Services made payment of \$260.00 to deponent's landlord.

10. That on June 7, 1972 deponent requested a fair hearing of the New York State Department of Social Services to review the right of the Westchester County Department of Social Services to deduct \$43.33 a month from her public assistance grant for a period of six months to recoup the duplicated rent. Attached hereto and marked as deponent's exhibit C is a copy of this request for a fair hearing.

11. That because of deponent's request for a fair hearing, no reduction of her public assistance grant was made pending the receipt of a decision in the requested fair hearing.

12. That on June 27, 1972, a fair hearing was held in White Plains, New York, at which time deponent contested the right of the Westchester County Department of Social Services to recoup the duplicated rent money from her current grant.

13. That a fair hearing decision dated July 21, 1972, upheld the right of the Westchester County Department of Social Services to recover the duplicated rent payments on the basis of authority given to it in Section 352.7 (g) (7) of the Regulations of the State Department of Social Services. Attached hereto and marked as deponent's exhibit D is a copy of this fair hearing decision.

14. That as a result of this fair hearing decision, deponent's public assistance grant for September has been reduced by \$43.30, and deponent has been informed that this deduction will continue through February, 1973.

15. That unless deponent is permitted to intervene in the above captioned action, her substantial rights may be prejudiced by any decision which may be rendered and the interests of justice will not thereby be served.

WHEREFORE, deponent respectfully prays that she may be permitted to intervene in the above captioned ac-

tion and for such other and further relief as to the Court may seem just and proper.

/s/ Barbara Seemiller
BARBARA SEEMILLER

Sworn to before me this 15th day of September, 1972.

/s/ John C. Doherty
JOHN C. DOHERTY
Notary Public, State of New York
No. 60-0979305
Qualified in Westchester County
Term Expires March 30, 1973

EXHIBIT A

COUNTY OF WESTCHESTER
DEPARTMENT OF SOCIAL SERVICESDivision of Family and Child Social Services
70 Ashburton Avenue, Yonkers, N.Y. 10701

Tel. YOnkers 3-7450

EDWIN G. MICHAELIAN
County Executive

[SEAL]

LOUIS P. KURTIS
CommissionerJOHN J. ALLEN
Director

May 17, 1972

Mrs. Barbara Siemiller
33 New Avenue
Yonkers, N.Y.

Dear Mrs. Seimiller:

This is to notify you that we have authorized two months back rent money in the amount of \$260 on this day.

We will recoup this money from future grants effective July 1, 1972 through December 31, 1972 at the rate of \$43.33 per month.

The check for the rent will be coming into this office. You will receive a letter requesting you to come into the office to sign the check, and we will then mail it directly to your landlord.

If you have any questions, please call me between 9:00 a.m and 12 p.m. on extension 261.

Sincerely,

/s/ L. Bloom
L. BLOOM
Unit Assistant

LB:dl

EXHIBIT B**COUNTY OF WESTCHESTER
DEPARTMENT OF SOCIAL SERVICES**

Division of Family and Child Social Services
70 Ashburton Avenue, Yonkers, N.Y. 10701

Tel. YOnkers 3-7450

**NOTICE OF INTENT TO REDUCE
PUBLIC ASSISTANCE**

EDWIN G. MICHAELIAN
County Executive

[SEAL]

LOUIS P. KURTIS
Commissioner

JOHN J. ALLEN
Director

Mrs. Barbara Siemiller
33 New Avenue
Yonkers, N.Y.

Category and
Case No. F 171623
Date: 5/17/72

This is to advise you that this department intends to **REDUCE** your public assistance grant from \$251 to \$209.70 for the following reason(s):

For the reason that you received duplicate rent money in the amount of \$260 to cover your March and April rent. The deduction will be effective 7/1/72 through 12/31/72.

You may have a conference at this department to review your case at any time before the proposed date of reduction of your grant.

/s/ **L. Bloom**
L. BLOOM
(Signed)

5/17/72
(Date)

RIGHT TO FAIR HEARING

If you believe that your assistance should not be reduced, you may request a state fair hearing by telephoning 212-488-3577 or by writing to Fair Hearing Section, New York State Department of Social Services, 1450 Western Avenue, Albany, New York, 12203. If you request a fair hearing, a notice will be sent to you informing you of the time and place of your hearing. At the hearing, you, your attorney or other representative will have an opportunity to present relevant written and oral evidence to demonstrate why your assistance should not be reduced as well as an opportunity to question any persons who appear at the hearing and present evidence against you. If you request a fair hearing before the date your assistance is proposed to be reduced, you will continue to receive your assistance unchanged until the fair hearing decision is issued.

- (2 copies to recipient)
- (1 copy to Albany)
- (1 copy to file)

PA/II—4/72

EXHIBIT C

June 7, 1972

N.Y.S. Department of Social Services
Fair Hearing Section
1450 Western Avenue
Albany, N.Y.

Gentlemen:

I am herewith making application for a Fair Hearing based on the fact that it is maintained that I received duplicate rent money of \$260.00 to cover March and April rent. I have been advised that this money will be deducted from July 1-December 31, 1972 at the rate of \$43.33 per month.

Please be advised that my husband was to pay this rent, under a Family Court Order, and my Landlord advised me that same was two months behind. I am faced with an Eviction Order if this is not paid. I have a 3 year old daughter to support, and if my subsistence is reduced I will be unable to support her and continue with my obligations.

My parents are not in a position financially to render any assistance. I look forward to hearing from you. They have advised me at the local office that these deductions will commence July 1st.

Sincerely,

(Mrs.) Barbara Seimiller

Enc. letters received from Social Services.

B/c Mr. Bloom

EXHIBIT D**STATE OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES****In the Matter of the Appeal of****BARBARA SIEMILLER**

From a determination by the Westchester County Department of Social Services (hereinafter called the agency)

A fair hearing was held at White Plains, New York, on June 27, 1972, before Francis R. Buckley, Hearing Officer, at which the appellant and representatives of the agency appeared. The appeal is from a determination by the agency relating to the reduction of a grant of aid to dependent children in that the agency determined to reduce the appellant's grant to recoup a duplication of rent payments. An opportunity to be heard having been accorded all interested parties and the evidence having been taken and due deliberation having been had, it is hereby found:

(1) The appellant and her child are recipients of public assistance under the category of aid to dependent children.

(2) On May 17, 1972 the agency determined to reduce the appellant's regularly recurring grant by \$43.33 per month for six months effective July 1, 1972 through December 31, 1972 to recoup \$260 advanced by the agency.

(3) The appellant's recurring grant included allowance for actual rent paid in amount of \$130 per month. The appellant failed to pay her rent for the months of March and April 1972 and was in receipt of an eviction order. The agency duplicated the rental allowance for those months by a two party check with the stipulation that it would be recovered by recoupment from future grants at the rate of \$43.33 per month for six months from July 1, 1972 through December 31, 1972.

(4) The agency sent a Notice of Intent to Reduce the appellant's grant on May 17, 1972. The appellant requested a fair hearing to review the agency's proposed

action on June 7, 1972. The agency was notified by the State Department of Social Services that appellant's grant must be continued without change until a fair hearing decision is issued. The agency has continued assistance unchanged to the appellant through the date of this hearing, and the agency has stated that assistance will be continued until a fair hearing decision is issued.

Section 352.7 (g) (7) of the Regulations of the State Department of Social Services provides that for a recipient of public assistance, who is being evicted for non-payment of rent for which a grant has been previously issued, an advance allowance may be provided to prevent an eviction. Such advance shall be deducted from subsequent grants in equal amounts over not more than the next six months.

The agency did advance rent, for which a grant had previously been issued, to prevent an eviction and properly determined to recover such advance.

DECISION: The determination of the agency is affirmed.

DATED: Albany, New York

July 21, 1972

/s/ Abe Lavine
ABE LAVINE
Commissioner

By /s/ Carmen Shang
CARMEN SHANG
Assistant Commissioner

IN UNITED STATES DISTRICT COURT

72 C 182

[Title Omitted]

AFFIDAVIT IN SUPPORT OF MOTION TO
INTERVENE AS A PLAINTIFF

ELIZABETH ELY, being duly sworn, deposes and says:

1. That I live at 1876 Straus Street, Brooklyn, New York together with my seven minor children. For the past eight years my children and I have been receiving assistance in the Aid to Dependent Children category. We receive \$348 for our basic needs (food, clothing, utilities, etc.), in addition my rent of \$250 per month is presently being paid by voucher directly to the landlord.

2. In June, 1972 the landlord commenced non-payment summary proceedings against me for accumulated arrears totalling \$455. The landlord obtained a final judgment for the arrears and a warrant of eviction. The New York City Department of Social Services' Williamsburg office issued a two party check payable to deponent and the landlord for the arrears. I was told to sign a consent to the agency's recoupment of the rent payment from our basic needs grant over a six month period; and I did so.

3. Sometime in June or July, I received written notice from the Department of Social Services advising me that they would reduce my grant over a six month period to recoup the \$455 by taking out the sum of \$74.16 each month. I requested a fair hearing before the New York State Department of Social Services. A hearing was held on or about August 3, 1972 and to date no decision has been rendered. My grant has not been reduced pending the fair hearing decision.

4. That I have been informed of this pending litigation concerning the validity of the State recoupment regulation (18 NYCRR § 352.7(g)(7) and inasmuch as

the recoupment will reduce my family's monthly basic needs grant during the recoupment period by more than 20% from \$348 to \$274, we are threatened with imminent harm and deprivation.

5. That I respectfully ask this Court for leave to intervene in the above captioned class action. Deponent's claim will present question of law and fact which are common to the pending class action. That deponent has been informed that the defendant State has raised the issue of mootness with respect to the named plaintiffs in the class action and unless deponent is permitted to intervene in the above caption class action, substantial rights may be affected or prejudiced by the decision rendered.

WHEREFORE, deponent in the interest of justice seeks leave to intervene in the above captioned action as a party plaintiff and such other and further relief as to this Court may seem just and proper.

/s/

ELIZABETH ELY

Duly sworn to before me this 11 day of September, 1972.

CARL JAY NATHANSON
Notary Public, State of New York
No. 24-8103025
Qualified in Kings County
Commission Expires March 30, 1973

STATE OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES

In the Matter of the Appeal of

ELIZABETH ELY

from a determination by the New York City Department
of Social Services (hereinafter called the agency)

DECISION AFTER FAIR HEARING

A fair hearing was held at Two World Trade Center, New York, New York on August 3, 1972 before Mario Gambacorta, Hearing Officer, at which the appellant, the appellant's representative and representatives of the agency appeared. The appeal is from a determination by the agency relating to the reduction of a grant of aid to dependent children in that the agency determined to reduce the appellant's grant to recoup advances made for rent payments. An opportunity to be heard having been accorded all interested parties and the evidence having been taken and due deliberation having been had, it is hereby found:

(1) The appellant and her seven children are recipients of aid to dependent children.

(2) On June 19, 1972, the agency determined to reduce the appellant's regularly recurring grant by \$74.16 per month for six months effective July 4, 1972 through January 4, 1973 to recoup \$455.00 advanced by the agency.

(3) The appellant's recurring grant included an allowance for actual rent paid in the amount of \$250.00 per month. The appellant failed to pay her rent during the months of March, April and May 1972 and had received an eviction order. The agency duplicated the rental allowance for part of March and all of April and part of May, 1972 with the stipulation that it would be recovered by deduction from future grants at a rate of \$74.16 per month for six months from July 4, 1972 through January 4, 1973.

(4) The agency sent a Notice of Intent to Reduce appellant's grant on June 14, 1972 to be effective July 4, 1972. The appellant requested a fair hearing to review the agency's proposed action on June 28, 1972. The agency was notified by the State Department of Social Services that appellant's grant must be continued without change until a fair hearing decision is issued. The agency has continued assistance unchanged to the appellant through the date of this hearing, and the agency has stated that assistance will be continued until a fair hearing decision is issued.

Section 352.7 (g) (7) of the Regulations of the State Department of Social Services provides that for a recipient of public assistance, who is being evicted for non-payment of rent for which a grant has been previously issued, an advance allowance may be provided to prevent an eviction. Such advance shall be deducted from subsequent grants in equal amounts over not more than the next six months.

The agency did advance rent for which grants had previously been issued, to prevent an eviction and properly determined to recover such advance.

DECISION: The determination of the agency is affirmed.

DATED: Albany, New York, Oct. 6, 1972.

/s/ Abe Lavine
Commissioner

By /s/ Carmen Shang
Assistant Commissioner

IN UNITED STATES DISTRICT COURT

72 C 182

[Title Omitted]

AFFIDAVIT IN SUPPORT OF MOTION TO INTERVENE
AS A PLAINTIFF

BARBARA LYNCH, being duly sworn, deposes and says:

1. That I reside at 40-08 196th Street, in Queens County, New York.

2. That I am together with my two minor children, John born September 22, 1963, and Brian born June 10, 1965, recipients of public assistance from the New York City Department of Social Services in the Aid to dependent children category. We have been receiving public assistance since November, 1971 as a result of being abandoned by my husband. We presently receive a monthly grant of assistance in the sum of \$299.80 of which \$138.80 represents the actual rent on our apartment.

3. That in June, 1972, the refrigerator in the apartment broke and the landlord refused to repair it. The refrigerator had broken down several months earlier and the landlord at that time repaired it but refused to pay for the repairs, insisting that I do so. As a result of the refrigerators breakdown, I have been unable to keep perishable foods or shop in bulk and have been compelled to shop each day spending more for food than usual.

4. That I was unable to pay the rent for August and September, 1972 and the landlord commenced non-payment summary proceedings and obtained a final order and warrant of eviction. After I received the 72 hour's notice from the Marshal, the Long Island City office of the New York City Department of Social Services issued a duplicate rent payment for the months of August and September, 1972 in the sum of \$277.60 by means of a two party check made payable to the landlord and myself. The landlord has accepted the rent and the eviction was avoided.

5. That I was advised by the New York City Department of Social Services at the time I received the duplicate rent payment, that they would recoup the \$277.60 over a period of 6 months commencing September 15, 1972 and continuing until February, 1973. I was also told to sign a form consenting to this recoupment and I did so.

6. That I have been informed of this pending litigation concerning the validity of the State recoupment regulation (18 NYCRR § 352.7(g) (7) and inasmuch as the recoupment will reduce my family's monthly basic needs grant during the recoupment period by more than 20% from \$161 to \$127, we are threatened with imminent harm and deprivation.

7. That I respectfully ask this Court for leave to intervene in the above captioned class action. Deponent's claim will present question of law and fact which are common to the pending class action. That deponent has been informed that the defendant State has raised the issue of mootness with respect to the named plaintiffs in the class action and unless deponent is permitted to intervene in the above captioned class action, substantial rights may be affected or prejudiced by the decision rendered.

WHEREFORE, deponent in the interest of justice seeks leave to intervene in the above captioned action as a party plaintiff and such other and further relief as to this Court may seem just and proper.

/s/ Barbara Lynch
BARBARA LYNCH

Duly sworn to before me this 7 day of September, 1972.

/s/ Carl Jay Nathanson
CARL JAY NATHANSON
Notary Public, State of New York
No. 24-8103025
Qualified in Kings County
Commission Expires March 30, 1973

THE CITY OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES

Center Q53

Address 32-20 No. Blvd. LIC

NOTICE TO CLIENT OF ADVANCEMENT OF
RENT TO FORESTALL EVICTION

Case Name: Lynch Barbara

Case Number: ADC 2980878-1

Address: 40-08 - 196 St., Flushing, N. Y.

This is to advise you that in order to forestall your eviction from the above address, we are advancing the sum of \$208.20 to be paid to your landlord.

Accordingly, each of your next six semi-monthly grants will be reduced by the sum of \$17.35 (1/12 of advancement).

Unit or Group Supervisor

Date

Unit or Group

COPY RECEIVED

Barbara Lynch 9/5/72
Client's Signature Date

(Prepare in triplicate)
Original to client
Duplicate to Case Record.
Triplicate to Control with W 661
W 662 or W 670.

IN UNITED STATES DISTRICT COURT

[Title Omitted]

INTERVENORS' COMPLAINT

I

Intervenors, on behalf of themselves and all other persons similarly situated, seek a declaration that § 352.7 (g) (7) of Title 18 of the New York Code of Rules and Regulations as promulgated on August 6, 1971, effective August 6, 1971, is in contravention of §§ 602(a) (7) and (a) (10) of the Social Security Act; 42 U.S.C. § 602(a) (7) and (a) (10), and is an impermissible reduction of the grant under 45 CFR § 233.20(a) and of the Equal Protection Clause to the Fourteenth Amendment to the United States Constitution.

Intervenors seek injunctive relief from any and all action taken under the aforesaid regulation to reduce or suspend their grants and those of other recipients of public assistance who are similarly situated.

II

PRELIMINARY STATEMENT

On August 6, 1971, the New York State Department of Social Services promulgated anew statewide regulation, § 352.7(g) (6) which was renumbered 18 N.Y.C. R.R. § 352.7(g) (7) effective December 10, 1971, which for the first time provided that any "advance allowances" issued to prevent eviction for nonpayment of rent for which a grant had already been issued shall be recouped and deducted in equal amounts from the regular family assistance grant during the subsequent six months. This regulation, which became effective immediately on August 6, 1971, has been applied throughout New York State to drastically reduce, over a six-month period, the monthly grants for basic needs of families who have been

threatened with eviction and required a duplicate rent payment.

The said regulation is in direct conflict with the Social Security Act's requirement in the federally aided programs of Aid to Dependent Children that aid be furnished with reasonable promptness to all eligible individuals. Specifically, said regulation inflicts a punishment upon dependent children by a drastic six-month reduction in their food, clothing and basic necessity allowance for acts or events beyond their control. Such a reduction is wholly inconsistent with the Social Security Act's requirement that eligibility determinations be made on the basis of need less available income and resources within the statutory assistance levels established in each state, and is a further illegal circumvention of the Social Security Act's prohibition on assumed income. The dependent children in recipient families who are issued a shelter grant to prevent eviction are equally needy in subsequent months but said Regulation automatically recoups the full amount regardless of how little of the subsequent basic grants remain to satisfy the family's needs.

The said Regulation further violates the Equal Protection Clause to the Fourteenth Amendment by discriminating irrationally and invidiously between different classes of recipients, and by imposing automatic reductions of basic needs grants without any standards. The basic subsistence grant for dependent children in families who have received duplicate rent payment to prevent eviction is arbitrarily reduced or suspended for six months while dependent children with identical basic needs in families who have not received duplicate rent payments receive their full monthly allotments. No basis, consistent with the purposes of the Social Security Act and relative to the existence or extent of need, exists for this discrimination. All families with dependent children are deemed by statute to be equally needy. The dependent children in a family that has prevented eviction is not the less needy of the essentials of living in subsequent months; yet, only dependent children in families which are the victims of threatened eviction are subjected to this drastic curtailment of subsistence benefits.

in violation of their right to Equal Protection of the Laws.

The harm inflicted by the automatic recoupment mandated by 18 N.Y.C.R.R. § 352.7(g) (7) is immediate, irreparable and devastating to families suddenly left for half a year with only a fraction of the funds needed for food, clothing and other basic necessities.

III

JURISDICTION

The jurisdiction of this Court is based upon 28 U.S.C. § 1343 in conjunction with 28 U.S.C. § 2201 and § 2202, 42 U.S.C. § 1983 and the Fourteenth Amendment to the United States Constitution.

IV

THREE JUDGE COURT

1) Intervenors seek preliminary and permanent injunctive relief from the enforcement and operation of 18 N.Y.C.R.R. § 352.7(g) (7) on the grounds of the unconstitutionality of such statewide regulation.

2) Pursuant to 28 U.S.C. § 2281, a three judge statutory court should be convened to hear and determine intervenors' claim.

V

STATEMENT OF CLAIM

1) New York operates and administers its Aid to Dependent Children program pursuant to the requirements of § 601 *et seq.* of the Social Security Act, 42 U.S.C. § 601 *et seq.*, for which it receives billions of dollars annually in federal reimbursement. Pursuant to required State Plan, and specifically 42 U.S.C. § 602(a) (23), New York has enacted in § 131-a of the Social Services Law, a statewide standard of need for all families and a con-

committant statewide schedule of monthly basic needs grants and allowances to be issued to persons determined to be needy. 18 N.Y.C.R.R. § 352.4. Such grants and allowances are designed to meet subsistence needs for food, clothing, furniture, household supplies, transportation and other personal expenses, but exclusive of shelter.

2) Shelter needs are met by a separately computed amount as determined by rent schedule promulgated in each local social services district pursuant to 18 N.Y.C.R.R. § 352.3. In all cases the rent allowance is issued in the amount of shelter expense actually paid, up to the maximums set forth in such schedule. A fuel for heating allowance is included where such expense is in fact incurred.

3) Each AFDC family receives a total public assistance grant every month comprised of the basic needs, shelter, and, if present, fuel for heating allowances. The full grant is issued every month in advance to meet that month's current needs. Unless family need, in fact, decreases, only available income and resources may be deducted on any given month to reduce the total amount.

4) On August 6, 1971, 18 N.Y.C.R.R. § 352.7(g) (6) was promulgated and made effective, providing that:

"For a recipient of public assistance who is being evicted for non-payment of rent for which a grant has been previously issued, an advance allowance may be provided to prevent such eviction or rehouse the family; and such advance shall be deducted from subsequent grants in equal amounts over not more than the next six months. When there is a rent advance for more than one month or more than one rent advance in a 12-month period, subsequent grants for rent shall be provided as restricted payments in accordance with Part 381 of this Title."

The Section was later renumbered 18 N.Y.C.R.R. § 352.7(g) (7) effective December 10, 1971.

5) Any element of choice or election by the recipients affected under said regulation is illusory and coerced. Families are told by social service workers that the only way to prevent eviction into the streets and possible mo-

tels, a placement with its disruptive, devastating effects upon children, is to "consent" to accepting the "advance" to the subsequent six month curtailment of basic needs. Often consent is not even sought.

6) The "advance" of rent results in no further surplus available income or resources to the recipient family since its use is restricted to payment of rent to the landlord to prevent eviction. The recoupment is mandatory and is implemented following the issuance of a duplicate rent payment. There are no exceptions permitted and no issues of fact for fair hearings.

7) Families in receipt of Aid to Dependent Children are deemed by § 131-a of the Social Services Law to have specific basic needs for food, clothing, household supplies, transportation, utilities and other essential items and the standard of need and level of payments available to meet those needs are set uniformly for all families. Under the Social Security Act the level of assistance actually granted cannot be reduced below those uniform levels unless there is available income or resources to make up the reduction deficiency. Yet, the regulation challenged herein results in drastic reductions of assistance for six months and leaves families with a small fraction of the funds needed to survive.

8) Said reduction lowers otherwise eligible families far below their correct levels of entitlements and results in denial of eligibility to persons whose income or other resources are just below welfare standards and are now, by application of this reduced eligibility standard, above such standards.

VI

INTERVENORS

1(a) Intervenors are all citizens of the United States and reside in New York State and intervened in this action pursuant to Rule 24 of the Federal Rules of Civil Procedure as members of the class of recipients of public assistance in New York State who have been aggrieved or are threatened with irreparable implementation of 18 N.Y.C.R.R. § 352.7(g) (7).

Intervenors are members of the class of recipients of public assistance in the Aid to Dependent Children category residing in New York State whose grants have been reduced or are threatened with reduction by the implementation of § 352.7(g) (7) of Title 18 of the New York Code Rules and Regulations.

(b) Intervenors present questions of fact and law which are common to the named plaintiffs and the class they represent. The claims of the intervenors are typical of the claims of all members of the class; the intervenors can fairly and adequately represent the claims of similar members of the class; the defendants are acting on grounds generally applicable to the entire class; the questions of law and fact common to the class predominate over any questions affecting individual members, and class action will best provide for a fair and efficient adjudication of this controversy.

2. The intervenors have had their basic needs grants drastically reduced or are threatened with reduction by the implementation of 18 N.Y.C.R.R. § 352.7(g) (7).

(a) Intervenor BARBARA SEEMILLER and her two infant children are recipients of public assistance in New York State in the Aid to Dependent Children category. They reside at 33 New Avenue in Yonkers, New York. In May, 1972, Mrs. Seemiller required a duplicate rent payment in the sum of \$260 to forestall an eviction. She was informed that her basic maintenance grant of \$161 would be reduced to \$117 for a period of six months to permit the local social services agency to recoup the duplicate rent payment. Mrs. Seemiller requested a fair hearing to challenge the recoupment. A hearing was held on July 21, 1972 and by decision dated August 2, 1972, the defendant upheld the implementation of the recoupment provision. Intervenor SEEMILLER's grant is presently being reduced to implement the recoupment regulation.

(b) Intervenor ELIZABETH ELY and her seven infant children are recipients of public assistance in New York State in the Aid to Dependent Children category and reside at 1876 Strauss Street in Brooklyn, New York. In June, 1972, she received a duplicate rent payment in the sum of \$455. She was informed that the family's

basic maintenance grant would be reduced monthly over a period of six months from \$348 to \$274 to permit the local agency to recoup the duplicate payment. Intervenor ELY requested a fair hearing challenging the threatened recoupment. A fair hearing was held on or about August 3, 1972; to date no decision has been rendered.

(c) Intervenor BARBARA LYNCH and her two infant children are recipients of public assistance in New York State in the Aid to Dependent Children category and reside at 40-08 196th Street, Flushing, New York. They presently receive a monthly grant for basic needs in the sum of \$161, together with a shelter allowance of \$138.80. In August and September, 1972, the New York City Department of Social Services issued intervenor LYNCH a duplicate rent payment in the sum of \$277.60 to forestall eviction after a final judgment for accumulated arrears had been obtained by her landlord. Intervenor LYNCH has been informed that effective September 15, 1972, her basic maintenance grant will be reduced monthly over a period of six months from \$161 to \$127 to permit the City Department of Social Services to recoup the duplicate rent payment.

VII

DEFENDANTS.

1. The defendant GEORGE K. WYMAN as Commissioner of the New York State Department of Social Services, has primary responsibility for the administration of that Department in compliance with state and federal law. New York Social Services Law § 34.

VIII

AS A FIRST CAUSE OF ACTION INTERVENORS ALLEGE:

1. 18 N.Y.C.R.R. § 352.7 (g) (7) violates the Social Security Act of 1935 and the regulations promulgated thereunder in that it mandates a reduction in assistance

benefits where no additional income or resources are available to make up for the reduction.

2. 42 U.S.C. § 602 (a) (10) provides that New York, by accepting federal funds, is under a duty "that Aid to Dependent Children shall be furnished with reasonable promptness to all eligible individuals." 42 U.S.C. § 602 (a) (7) provides that a "State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to Families with Dependent Children."

3. 45 C.F.R. § 233.20(a) provides in pertinent part:

"A State Plan for OOA, AFDC, AB, APTD, or AABD, must, as specified below:

(3) (ii) Provide that, in establishing financial eligibility and the amount of the assistance payment:

* * * *

(c) only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered; (d) current payments of assistance will not be reduced because of prior overpayment unless the recipient has income or resources currently available in the amount by which the agency proposes to reduce payment;"

* * * *

(viii) Provide that payment will be based on the determination of the amount of assistance needed,"

4. HEW, *Handbook of Public Assistance*, Part IV § 3131 provides that: "The State Plan must provide that loans made under conditions that preclude their use for meeting current living costs and that are held and used in accordance with such conditions shall not be considered available for such needs and that the sums so held and used shall not be taken into account in determining the assistance payment.

5. The United States Department of Health, Education and Welfare has not approved 18 N.Y.C.R.R. § 352.7 (g) (7).

6. Under 18 N.Y.C.R.R. § 352.7(g) (7) defendants violate the aforesaid provisions of law by reducing the monthly grants of recipients of public assistance who have received a grant to prevent eviction for non-payment of rent for which a grant had been previously issued, when no income or resources are available to compensate for or to meet the residual need caused by that reduction.

IX

AS AND FOR A SECOND CAUSE OF ACTION:

1. 18 N.Y.C.R.R. § 352.7(g) (7) in requiring the reduction of grants issued to children whose grants have been reduced because of prior payments to avoid eviction for nonpayment violates the fundamental mandate of the Social Security Act's Aid to Dependent Children program, "to enable the child's unmet need to be supplied." HEW, Handbook of Public Assistance, Part IV § 3401, and to refrain from penalizing children for the difficulties, faults or misfortunes of their parents. 42 U.S.C. § 602 (a) (10).

X

AS AND FOR A THIRD CAUSE OF ACTION:

1. All persons deemed needy in New York under § 131-a of the Social Services Law have their subsistence grants determined by the schedules provided in that statute without any deductions except for available income and resources.

2. Intervenors, as persons threatened with eviction for non-payment, regardless of cause or circumstances, are singled out and forced by 18 N.Y.C.R.R. § 352.7(g) (7) to accept a drastic six month reduction in subsistence grants though no additional income or resources are available to compensate for said reduction.

3. Said regulation irrationally and invidiously discriminates against intervenors' dependent children in

families which require duplicate rent payments to avoid eviction. No basis exists in law or fact consistent with the purposes of the Social Security Act for reducing the level of payments to intervenors who are then forced to live far below the subsistence levels provided to all other persons. Said regulation applies a wholly different standard in determining the grant levels of intervenors than the standard applicable to all other persons, in violation of the Equal Protection Clause to the Fourteenth Amendment to the United States Constitution.

XI

Intervenors have no adequate remedy at law. The implementation of 18 N.Y.C.R.R. § 352.7(g)(7) is causing, and will continue to cause, immense, irreparable and devastating harm to families with children whose basic needs of survival, food, clothing, and other essentials of life, have been drastically curtailed, unless enjoined forthwith.

WHEREFORE, intervenors respectfully pray on behalf of themselves and all others similarly situated that this Court grant the following relief:

1) That a preliminary and permanent injunction be made and entered enjoining the defendant, his successors in office, agents, employees and all other persons in active concert and participation with him from enforcing 18 N.Y.C.R.R. § 352.7(g)(7) on the grounds that said regulation violates the requirements of the federal Social Security Act, 42 U.S.C. § 602(a)(7) and (a)(10) and is an impermissible reduction in grant under 45 C.F.R. § 233.20(a) and violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

2) That a declaratory judgment be made and entered holding that 18 N.Y.C.R.R. § 352.7(g)(7) violates § 602(a)(7) and (a)(10) of the Social Security Act, 42 U.S.C. § 602(a)(7) and (a)(10), 45 U.S.C. § 233.20(a) and the Due Process and Equal Protection Clauses of

the Fourteenth Amendment to the United States Constitution.

3) Allow intervenors their costs herein and grant them and all other persons similarly situated such additional or alternative relief as the Court may deem to be just and proper.

Dated: September 29, 1972

NASSAU COUNTY LAW SERVICES
COMMITTEE, INC.

By: CARL JAY NATHANSON
of counsel
Attorney for Intervenors
1570 Old Country Road
Westbury, New York 11590
(516) 997-9680

IN UNITED STATES DISTRICT COURT

Docket No. 72-C-182

[Title Omitted]

MEMORANDUM OF DECISION AND ORDER

October 19, 1972

This case was remanded [462 F.2d 928 (2d Cir. 1972)] to this court to determine whether recoupment of an advance payment under 18 N.Y.C.R.R. § 352.7 (g) (7) is a reduction in grant thereby requiring a fair hearing as provided in 18 N.Y.C.R.R. § 351.26¹ and as required under *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011 (1970).²

When the matter come on for hearing, application was granted (on consent) allowing the following parties to intervene as additional named plaintiffs of the class of recipients of public assistance in the Aid to Families With Dependent Children (AFDC) program whose monthly grant has been reduced or threatened with reduction through recoupment under 18 N.Y.C.R.R. § 352.7(g) (7):³

¹ 18 N.Y.C.R.R. § 351.26 was repealed April 21, 1972, effective April 22, 1972 and incorporated in § 358.4. That section sets forth the grounds on which a recipient of benefits under AFDC is entitled to a fair hearing. "Reduction in Grant" is not a ground set forth in the statute. The State has advised the court that recipients affected by the recoupment provision of § 352.7(g) (7) are entitled to fair hearings under the § 358.4(a) (3) criteria of "inadequacy of amount or manner of payment of assistance."

² Judge Lumbard dissented and voted for reversal of the judgment in favor of the plaintiffs holding "[N]othing in the governing federal statute bars the state from accelerating welfare payments in one month, and then reducing subsequent monthly grants."

³ The regulation was numbered § 352.7(g) (6) at the time the action was instituted and renumbered § 352.7(g) (7) as of December 10, 1971.

BARBARA SIEMILLER, for herself and her infant child, KARIN;

ELIZABETH ELY, for herself and her seven minor children;

BARBARA LYNCH, for herself and her two minor children.

Barbara Siemiller and her infant child Karin, age three, received a monthly grant of \$251. The grant included a shelter allowance of \$130 and the balance of the grant, i.e. \$121 for basic needs. She fell in arrears for the months of March and April 1972. She was unable to pay the rent arrears and her food bills and purchase other necessities at the same time. She was threatened with eviction. She requested the Westchester County Department of Social Services to pay the rent arrears. The Department made payment and advised Mrs. Siemiller that the \$260 would be recouped from monthly grants beginning in July 1, 1972 at the rate of \$43.33 per month.

Mrs. Siemiller requested and received a fair hearing before the Westchester County Department of Social Services. The Department of Social Services of the State of New York affirmed that determination on July 21, 1972. Neither the County nor State Department of Social Services considered the effect the recoupment would have on the child.

Griffith v. Wyman, — A.D.2d — (1st Dept. June 19, 1972) annulled the determination of the Commissioner of the New York State Department of Social Services and remanded for a rehearing because of failure to comply with proper fair hearing procedures.⁴ The court in

⁴ The court heard two cases. One involved a fraudulent affidavit where the recipient under Old Age Assistance committed the fraud in stating checks representing the grant had been lost or stolen (Griffith); the other involved duplicate payment under §52.7(g)(7) to avoid threatened eviction of the recipient under the AFDC program (Boyd). Mr. Justice Steuer in dissent distinguished the cases. Referring to the AFDC program he said:

"... The beneficiaries of the Act are the children. The courts have recognized that their current needs are not lessened by an overpayment in the not too recent past. Nor are they to be

Griffith said:

"... it should be noted that the public assistance paid to the recipient was primarily for the support of her five children. They may not be charged with the fraud or wrongdoing of this petitioner. This factor should be a matter for consideration by the State Commissioner on a rehearing."

The Attorney General's letter of September 7, 1972 states that *Griffith* suggests that the effect of recoupment on dependent children presents a fact question in fair hearings on recoupment under § 352.7(g) (7). *Griffith* involved recoupment under § 352.7(g) (1).⁵ The provisions are similar. In the case of a lost or stolen check, however, the negligence of the recipient with reference to the check will not allow recoupment of the duplicate payment. The section provides recoupment only when the recipient has practiced a fraud in endorsing and cashing a check. Under § 352.(g) (77, however, the section mandates recoupment regardless of fault.⁶ Recipients

penalized for their parents' action, illegal or even criminal. State regulations to the contrary are no bar."

⁵ 18 N.Y.C.R.R. § 352.7(g) (1) provides:

(g) *Payment for services and supplies already received.* Assistance grants shall be made to meet only current needs. Under the following specified circumstances payment for services or supplies already received is deemed a current need:

(1) If a check for a grant is reported lost or stolen, an affidavit of loss shall be required of the recipient and payment of the check shall be stopped. Such check shall be replaced without delay and issuance of such replacement shall not be delayed pending further substantiation of client's affidavit. If payment cannot be stopped, the social services district shall claim State reimbursement on only one of the two checks. When it is established that a recipient endorsed and cashed an allegedly lost, stolen or undelivered check which had been replaced, subsequent grants shall be reduced over a period not on excess of six months, to provide for recoupment of such payment. Under such circumstances the allowance to meet the rent may be paid on a restricted basis during the period of recoupment.

⁶ For example—Leaving an endorsed check unattended, or failing to take prudent measures to prevent theft of the monthly payments.

threatened with eviction are in default for a variety of reasons; at times it is mismanagement of the funds allotted; at times it is for reasons beyond their control.⁷

The Attorney General in a letter dated September 7, 1972 suggests that *Griffith* held that "... the effect on children" would be an issue to be determined in the fair hearing to determine the right to recoupment. It is noted that the Siemiller determination was made after *Griffith*. No finding was made on that issue. The pertinent section mandates recoupment if it is established that duplicate payments have been made to avoid threatened eviction. The members of the class do not seek fair hearings. The court believes that if fair hearings were afforded the members of the class, the determination would be the same as in Siemiller. The court should not require further effort involving long delays to arrive at the issue posed in this action. *Cooper v. Laupheimer*, 316 F. Supp. 264, 266 (E.D. Pa. 1970).

Defendants argue that 18 N.Y.C.R.R. § 352.7(g) (7) is not in conflict with 42 U.S.C. § 602(a) (7) and 45 C.F.R. § 233.20(a) (3) (ii) (c) since the Federal statute and regulation define eligibility requirements while the New York statute does nothing more than provide a convenient method of recovering the "advance allowance."⁸ The argument disregards the stated statutory purpose and objective of the AFDC program, i.e.,

⁷ Cynthia Hagans received a monthly check of \$326 for herself and her two infant children. Of this \$165 was determined to be the shelter allowance. She was unable to find quarters at the rental allowed. She rented an apartment in Massapequa at \$200 per month. The Attorney General conceded that it was difficult to find accommodations at the rental figure allowed. Mrs. Hagans accumulated a deficiency in her rental allowance so that she was unable to pay the rent of December 1971. She was evicted from her apartment in January 1972. She found a new apartment in Amityville at \$175 per month. The Nassau County Department of Social Services made a duplicate rent payment from the February 1972 monthly benefit check. The February 1972 check to Mrs. Hagans for herself and her two children was \$17.

⁸ The *amicus* brief submitted by the Department of Health, Education & Welfare deals with defendants' argument as follows:

"... The Act provides only for federal assistance with respect to state payments for current needs which have been deter-

"... to furnish financial assistance and rehabilitation to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection. 42 U.S.C. § 601."

The argument also overlooks the relationship between the parent or parents and the dependent children with relation to the benefits received. The mother, father or other relative is merely the disbursing agent of the monthly benefits. The person so appointed is selected by the State.⁹ In *Cooper v. Laupheimer*, *supra* at p. 269, the court said:

"The Pennsylvania regulation is inconsistent with the Social Security Act for the [same] reason . . . it punishes the child by depriving him of a substantial portion of AFDC assistance which he is eligible to receive because his mother mistakenly or fraudu-

minated to exist in the month for which the payment is made. It does not permit accelerated payments or repayable loans, which is, effectively, the characterization which New York places upon such payments under 18 N.Y.C.R.R. 352.7(g) (7). (Page 2-3)

"... HEW believes that while states are required to consider the individual's income and resources, they may consider those items which the recipient actually has at his disposal. Thus, HEW has consistently interpreted these sections as permitting the states to consider as available to the recipient only income and resources which are actually at the recipient's disposal in a particular month, and as disallowing states from creating presumptions of availability of income. 45 C.F.R. 233.20(a) (3) (ii)." (Page 4)

⁹ 45 C.F.R. § 234.60 sets out requirements for Protective and vendor payments for dependent children in State plans. Under the section of the State may under established criteria provide for the appointment of one other than the parent where it is demonstrated that the parent is unable to manage the funds. Direct payment for food, living accommodations may also be embodied in the State plan.

lently obtained an extra payment months ago . . . the target and primary beneficiary of AFDC aid is the child; the mother is merely the conduit through which the funds are channeled to the child . . ."

Furthermore, the regulation is repugnant to the provisions of the Act in its total disregard of the concept of need. Congress established only two prerequisites for eligibility: need and dependency. *The Pennsylvania regulation must be measured against these criteria, even though it deals with reduction of aid rather than conditions of eligibility, because it was the intent of Congress that need and dependency be the only two conditions restricting of AFDC grants.* While each state is free, under the statute, to set its own standard of need and to determine the level of benefits to be administered, the Pennsylvania regulation ignores the Department's own prior determination that the family is in need and that a specified amount of semi-monthly aid must be provided to meet those needs. The regulation arbitrarily directs that the duplicate payment must be recovered by proportionate reductions in two or four consecutive payments, regardless of how little remains to satisfy the family's needs. (Underlining supplied)

18 N.Y.C.R.R. § 352.7(g)(7) contravenes 42 U.S.C. § 602(a)(7) and (a)(10) and 45 C.F.R. § 233.20(a).

The Clerk is directed to enter a judgment forthwith enjoining the defendants from attempting to recoup duplicate payments from AFDC benefit payments as mandated under 18 N.Y.C.R.R. § 352.7(g)(7) and directing repayment of all sums deducted from AFDC benefit payments on and after October 1, 1972.

The judgment is stayed for five days to afford defendants an opportunity to apply to the Circuit Court of Appeals for the Second Circuit for a further stay pending appeal.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

(No. 1 10-26-72)

72-8171

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of October, one thousand nine hundred and seventy-two.

CYNTHIA HAGANS, for herself and her two infant children, KIMBERLY AND KOREY; *et al.* PLAINTIFFS-APPELLEES

v.

GEORGE K. WYMAN, as Commissioner of the New York State Dept. of Social Services, *et al.*
DEFENDANTS-APPELLANTS

It is hereby ordered that the motion made herein by counsel for the appellant by notice of motion dated October 20, 1972, for a stay pending appeal be and it hereby is granted.

It is further ordered that all parties may file their papers in typewritten form and the appellants shall file their brief and joint appendix on or before November 8, 1972; that appellee shall file its brief on or before November 15, 1972; that the appeal shall be set for argument promptly thereafter.

A. DANIEL FUSARO,
Clerk

* * * *

BEFORE: HON. LEONARD P. MOORE,
HON. PAUL R. HAYS,
HON. WILLIAM H. MULLIGAN,

Circuit Judges

Nov. 2, 1972

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Title Omitted]

OPINION OF COURT OF APPEALS

BEFORE:

FRIENDLY,

Ch. J.,

WATERMAN AND HAYS,

C.J.J.

Appeal from an order of the United States District Court for the Eastern District of New York, Jacob Mishler, Chief Judge, permanently enjoining the enforcement or implementation of Section 352.7(g)(7) of Title 18 of the New York Code of Rules and Regulations, which permitted the state to recoup advances for rent from subsequent grants under the Aid to Dependent Children Program. Remanded to dismiss for want of jurisdiction.

MICHAEL COLODNER, Assistant Attorney General, State of New York (Louis J. Lefkowitz, Attorney General, Samuel A. Hirshowitz, First Assistant Attorney General, on the brief), for Appellants.

CARL JAY NATHANSON, Hempstead, New York, for Appellees.

HAYS, Circuit Judge:

The State of New York appeals from an order of the United States District Court for the Eastern District of New York permanently enjoining the enforcement or implementation of Section 352.7(g)(7) of Title 18 of the

New York Code of Rules and Regulations,¹ a regulation permitting the state to recoup advance payments for rent from subsequent grants under the Aid to Dependent Children Program (ADC). In issuing the injunction the District Court held that the New York regulation violated the Social Security Act, 42 U.S.C. § 601 et seq., and the regulations promulgated thereunder. We find that the District Court did not have jurisdiction to reach the pendent statutory claim because no substantial constitutional claim was presented by the facts of this case. We therefore remand the case with instructions to dismiss for want of jurisdiction.

The plaintiffs in this action are all recipients of aid under the ADC Program. Under this program the plaintiffs receive monthly grants to pay for shelter, fuel, and other necessities. The plaintiffs spent the portion of the grant designated for shelter for some other purpose and were therefore unable to pay their rent. When they were threatened with eviction, the New York State Department of Social Services paid their rent and deducted the amount advanced from later grants made under the ADC Program. Plaintiffs objected to the recoupment, claiming that the regulation authorizing the recoupment violated the equal protection clause of the 14th Amendment and contravened the provisions of the Social Security Act, 42 U.S.C. § 601 et seq. and the regulations promulgated thereunder. The District Court agreed with

¹ 18 NYCRR 352.7(g) (7) states as follows:

"(g) Payment for services and supplies already received. Assistance grants shall be made to meet only current needs. Under the following specified circumstances payment for services or supplies already received is deemed a current need:

* * * *

"(7) For a recipient of public assistance who is being evicted for nonpayment of rent for which a grant has been previously issued, an advance allowance may be provided to prevent such eviction or rehouse the family; and such advance shall be deducted from subsequent grants in equal amounts over not more than the next six months. When there is a rent advance for more than one month, or more than one rent advance in a 12 month period, subsequent grants for rent shall be provided as restricted payments in accordance with Part 381 of this Title".

plaintiffs' second contention and found that 18 NYCRR 352.7(g)(7) violated the Social Security Act and the regulations promulgated under the Act, and permanently enjoined the enforcement of the regulation. This court granted a stay of the District Court's order and set an expedited appeal schedule. The case was argued on April 7, 1972, and the stay was continued pending the decision of the panel. On June 15, 1972 this Court vacated the order of the District Court and remanded the case to determine whether under the state procedure plaintiffs were entitled to a notice and hearing. With the consent of the parties, hearings on remand were adjourned until October 6, 1972. At this time, plaintiffs moved to permit certain additional persons to intervene as plaintiffs. Several of these intervenors had had state hearings.² On October 19th, the District Court again permanently enjoined the enforcement of 18 NYCRR § 362.7(g)(7). This court stayed the injunction for the second time and heard oral argument on November 30.

Plaintiffs advance 28 U.S.C. § 1343(3) as the primary basis for jurisdiction in this case.³ This section provides:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citi-

² The five original plaintiffs had never requested hearings.

³ Plaintiffs also assert 28 U.S.C. §§ 2201 and 2202 and 42 U.S.C. § 1983 as bases for jurisdiction. However, it is well settled that 28 U.S.C. §§ 2201 and 2202, providing for declaratory judgments, cannot be used as a basis for jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950). Section 1983 is implemented by Section 1343, and no separate jurisdictional claim can be advanced on the basis of § 1983 alone. See *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972). See Note, *Federal Jurisdiction Over Challenges to State Welfare Programs*, 72 Colum. L. Rev. 1404, 1407 (1973).

zens or of all persons within the jurisdiction of the United States".

To establish jurisdiction under this statute, a substantial constitutional claim must be advanced. E.g., *Almenares v. Wyman*, 453 F.2d 1075, 1082 (2d Cir. 1971), cert. denied, 405 U.S. 944 (1972). Plaintiffs clearly fail to meet this standard.

Plaintiffs claim that they were denied equal protection of the laws because the recoupment of advances resulted in a lower grant of assistance than that available to other welfare recipients.

Dandridge v. Williams, 397 U.S. 471, 485 (1970) provides the guidelines for evaluating equal protection claims in social welfare cases.

"A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." (Quoting *McGowan v. Maryland*, 366 U.S. 420, 426 (1961)).

The regulation in question, 18 NYCRR § 352.7(g)(7), has a rational basis. Since the state has a limited amount of funds available to allocate to welfare recipients, the recoupment regulation is reasonably designed to ensure that there are sufficient funds available to all recipients on the level set by the state legislature. By receiving the advance payment plaintiffs have gotten more than the normal grant. Without the recoupment regulation, the plaintiffs would be in a preferred position over all the other welfare recipients who have paid their full rent out of the normal grant. The purposes of equal protection are served by treating all alike without granting special favor to those who have misappropriated their rent allowance. If there were no recoupment provision, there would be a disincentive for welfare recipients to manage their grants so as to have funds available to pay their rent each month. The recoupment provision encourages proper money management, an entirely acceptable, if incidental, purpose of the welfare legislation.

No doubt there are other ways in which the state could accomplish the ends served by the use of the recoupment

regulation. However, it is not for us to evaluate the wisdom of the state's choice of means. If these means are rationally related to a proper end, as they are in this case, we have no power to go further.

Because no substantial constitutional claim was presented, the district court was without jurisdiction to consider the statutory claim urged by plaintiffs. We therefore remand this case with instructions to dismiss for want of jurisdiction.

SUPREME COURT OF THE UNITED STATES

No. 72-6476

CYNTHIA HAGANS, ET AL., PETITIONERS

v.

ABE LAVINE, Commissioner of New York State

Department of Social Services, ET AL.

On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the said motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 11, 1973

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MICHAEL RODAK, JR.

**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1973

No. 72-6476

**CYNTHIA HAGANS, for herself and her two infant children,
KIMBERLY and KOREY; BERTHA GRISSETT, for herself
and her five infant children, DEBORAH, ANGELO,
WILLIAM, LINDA and CYNTHIA; KATHRYN ZAVER-
ZENCE, for herself and her infant child, DANA LYNN;
KAREN HORNECK, for herself and her infant child, TODD,
and her intrauterine child yet unnamed; EURLEEN CAR-
SON, for herself and her two infant children, TIMOTHY and
CALVIN; BARBARA SIEMILLER, ELIZABETH ELY and
BARBARA LYNCH, as individuals and on behalf of all other
persons similarly situated,**

Petitioners,

v.

**ABE LAVINE, as Commissioner of the New York State
Department of Social Services, and JAMES M. SHUART, as
Commissioner of the Nassau County Department of Social
Services,**

Respondents.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT**

BRIEF OF PETITIONERS

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TABLE OF CONTENTS

	<u>Page</u>
OPINION BELOW	1
JURISDICTION OF THIS COURT	2
CONSTITUTIONAL PROVISIONS	2
STATUTES AND REGULATIONS INVOLVED	2
QUESTIONS PRESENTED	5
STATEMENT OF THE CASE	5
The History of These Proceedings	8
SUMMARY OF ARGUMENT	12
ARGUMENT	18
POINT I Appellants Complaint Presents Substan- tial Constitutional Questions Establishing Federal Court Jurisdiction	18
A. The Procedural Posture	18
B. Standard of Review: <i>Goosby v. Osser</i> , 409 U.S. 412	21
C. Substantial Constitutional Questions Are Presented	23
1. The denial of the state deter- mined level of assistance to needy children receiving benefits under the Aid to Dependent Children program is not rationally based and constitutes invidious discrim- ination	24
2. The classification is not "Ration- ally Based"	25
a. The regulation violates the mandated goals of the Social Security Act	26

(ii)

b. The recoupment regulation is destructive of overriding state objectives	27
c. The classification is not free from invidious discrimination	28
D. No Prior Decisions of the Court "Inescapably Render the Claims Frivolous"	30
POINT II The District Court Had Jurisdiction Under 28 U.S.C. §§1343(3) and (4) To Determine the Federal Statutory Claims	34
A. Deprivations of Rights Established by Federal Statutes May Be Redressed Under §1983	35
B. 28 U.S.C. §1343(4) Provides Federal Jurisdiction for §1983 Claims	37
C. 28 U.S.C. §1343(3) Provides Federal Jurisdiction for §1983 Claims	50
D. Practical and Policy Considerations Support the Conclusion that §1343 Was Intended To Provide Federal Jurisdiction for All §1983 Suits	59
CONCLUSION	64
Appendix A	1A

TABLE OF AUTHORITIES

Cases Cited:

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970)	35
Addison v. Holly Hill, 322 U.S. 607 (1944)	43
Aetna Casualty Co. v. Flowers, 330 U.S. 464 (1947)	63
Aguayo v. Richardson, 473 F.2d 923 (2d Cir. 1973)	32
Allen v. Board of Elections, 393 U.S. 544 (1969)	49

(iii)

Almenares v. Wyman, 453 F.2d 1075 (2d Cir. 1971), <i>cert. denied</i> , 405 U.S. 544 (1972)	41
Atlantic Cleaners & Dyers v. United States, 286 U.S. 427 (1932)	56
Baker v. Carr, 369 U.S. 186 (1962)	12, 22, 37
Bass v. Rockefeller, 331 F. Supp. 945 (S.D.N.Y. 1971) <i>vacated as moot</i> , 464 F.2d 1300 (2d Cir. 1971)	40, 63
Bell v. Burson, 402 U.S. 535 (1971)	14, 19
Bell v. Hood, 327 U.S. 678 (1946)	22
Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1972)	62
Boddie v. Connecticut, 401 U.S. 371 (1971)	23, 24
Bomar v. Keyes, 162 F.2d 136 (2d Cir.) <i>cert. denied</i> , 332 U.S. 825 (1947)	36, 50
Boraas v. BelleTerre, 476 F.2d 806 (2d Cir. 1973), <i>en banc hearing denied</i> , 476 F.2d 824	32
Bradford v. Juras, 331 F. Supp. 167 (D. Ore. 1971) ..	26, 33, 35
Carrington v. Rash, 380 U.S. 89 (1965)	29
Carter v. Stanton, 405 U.S. 661 (1972)	31
City of Greenwood v. Peacock, 384 U.S. 808 (1966)	36, 58
City of New York v. Richardson, 473 F.2d 923 (2d Cir. 1973)	32
Cooper v. Laupheimer, 316 F. Supp. 264 (E.D. Pa. 1970)	26, 33, 35
Corfield v. Coryell, 6 F. Cas. 546 (No. 3230)	38
Crowley v. Bressler, 181 Misc. 59 (Sup. Ct. 1943)	27
Damico v. California, 389 U.S. 416 (1967)	39
Dandridge v. Williams, 397 U.S. 471 (1972)	<i>passim</i>
District of Columbia v. Carter, 409 U.S. 418 (1973)	55, 57
Douglas v. City of Jeanette, 319 U.S. 157 (1943)	37

(iv)

Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), <i>cert. denied</i> , 400 U.S. 841 (1970)	41
Eisenstadt v. Baird, 405 U.S. 438 (1972)	30, 31
Francis v. Davidson, 340 F. Supp. 351 (D. Md. 1972)	32
General Motors Acceptance Corp. v. Whisnant, 387 F.2d 774 (5th Cir. 1968)	43
Georgia v. Rachel, 384 U.S. 780 (1966)	55, 59
Giaccio v. Pennsylvania, 382 U.S. 339 (1965)	19
Goldberg v. Kelly, 397 U.S. 254 (1970)	24, 32, 39
Gomez v. Florida State Employment Service, 417 F.2d 569 (5th Cir. 1969)	40
Goosby v. Osser, 409 U.S. 512 (1973)	12, 21, 22, 32, 33
Hagans v. Wyman, 462 F.2d 928 (2d Cir. 1972)	11, 18
Hagans v. Wyman, 471 F.2d 347 (2d Cir. 1973)	2, 41
Hall v. Garson, 430 F.2d 430 (5th Cir. 1970)	40
Heiner v. Donnam, 285 U.S. 312 (1932)	19
Holloway v. Parham, 340 F. Supp. 336 (N.D. Ga. 1972)	26, 33, 35
Hurd v. Hodges, 334 U.S. 24 (1948)	57
Jackson v. Choate, 404 F.2d 910 (5th Cir. 1968)	31
James v. Strange, 407 U.S. 128 (1972)	30
Jefferson v. Hackney, 406 U.S. 535 (1972)	60
Johnson v. New York State Education Dept., 449 F.2d 871 (2d Cir. 1972) vacated and remanded, 409 U.S. 79 (1972)	32
Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) ...	16, 49, 57
King v. Smith, 392 U.S. 309 (1968)	<i>passim</i>
Levy v. Louisiana, 391 U.S. 68 (1972)	13, 28
Lewis v. Martin, 397 U.S. 552 (1970)	20, 34
Lindsey v. Normet, 405 U.S. 56 (1972)	25, 29

(v)

Lynch v. Household Finance Corp., 405 U.S. 538 (1972)	<i>passim</i>
McCall v. Shapiro, 416 F.2d 246 (2d Cir. 1969)	32, 41
McNeese v. Board of Education, 373 U.S. 668 (1963)	39, 58
Mitchum v. Foster, 407 U.S. 225 (1972)	<i>passim</i>
Monroe v. Pape, 365 U.S. 167 (1961)	<i>passim</i>
Moor v. County of Alameda, ___ U.S. ___, 93 S.Ct. 1785 (1973)	15, 39
New York Department of Social Services v. Dublino, ___ U.S. ___, 93 S.Ct. 2507 (1973)	60
Ortwein v. Schwab, ___ U.S. ___, 93 S.Ct. 1172 (1973)	62
Platt v. Union Pacific R. R. Co., 99 U.S. 48 (1878)	43
Poresky, Ex Parte, 290 U.S. 30 (1933)	30
Preiser v. Rodriguez, ___ U.S. ___, 93 S.Ct. 1827 (1973)	39, 55, 62
Reed v. Reed, 404 U.S. 71 (1971)	13, 25, 30, 31
Rinaldi v. Yeager, 384 U.S. 305 (1966)	25
Rosado v. Wyman, 397 U.S. 397 (1970)	<i>passim</i>
Russo v. Kirby, 453 F.2d 548 (2d Cir. 1971), <i>aff'd</i> . 93 S.Ct. 1973	32
Schatte v. International Alliance of Theatrical Stage Employees, 182 F.2d 158 (9th Cir. 1950)	62
Slaughter-House Cases, 16 Wall 36 (1872)	36, 38
Stanley v. Illinois, 405 U.S. 645 (1972)	28
Stogner v. Page, 1 CCH Pov. L. Rep. para. 553.901 (N.D. Ill. 1970)	40
Testa v. Katt, 330 U.S. 386 (1947)	62
The Fair v. Kohler Die & Specialty Co., 228 U.S. 22 (1913)	21

(vi)

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United States v. Bass, 404 U.S. 336 (1971)	37
United States v. Guest, 383 U.S. 745 (1966)	36
United States v. Johnson, 390 U.S. 563 (1968)	62
United States Dept. of Agriculture v. Moreno, 93 S.Ct. 2821 (1973)	13, 29, 30
United States v. Price, 383 U.S. 787 (1966)	36
United States v. Williams, 341 U.S. 70 (1951)	56
Uptagrafft v. United States, 315 F.2d 200 (4th Cir. 1963), <i>cert. denied</i> , 375 U.S. 818 (1963)	43
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Constitutional Provisions:

United States Constitution

Article III, Section 2	21
First Amendment	55
Fourteenth Amendment	<i>passim</i>

New York State Constitution

Article XVII, Section 1	27
-----------------------------------	----

Federal Statutes:

5 U.S.C. § 701 <i>et seq.</i>	61
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1331	63
28 U.S.C. § 1337	63
28 U.S.C. § 1343	58, 59, 62, 63
28 U.S.C. § 1343(1)	43
28 U.S.C. § 1343(2)	43
28 U.S.C. § 1343(3)	<i>passim</i>
28 U.S.C. § 1343(4)	<i>passim</i>
28 U.S.C. § 1345	43
28 U.S.C. § 1443	58
28 U.S.C. § 1443(1)	55, 56, 57
28 U.S.C. § 2201	9
42 U.S.C. § 602(a)(7)	3, 9, 14, 15, 34
42 U.S.C. § 602(a)(10)	4, 9, 15, 34
42 U.S.C. § 602(a)(15)(B)(ii)	29
42 U.S.C. § 604	61
42 U.S.C. § 606(b)(2)	29
42 U.S.C. § 1316	61
42 U.S.C. § 1971	44, 46
42 U.S.C. 1971(d)	44
42 U.S.C. 781	40, 49, 51
42 U.S.C. § 1982	40, 49
42 U.S.C. § 1983	<i>passim</i>
42 U.S.C. § 1985	40, 42, 45
42 U.S.C. § 1988	40, 42
42 U.S.C. § 1993	45, 46, 48
42 U.S.C. § 2000a <i>et seq.</i>	36
Civil Rights Act of 1866, Act of April 9, 1866, ch.	
31, 14 Stat. 27	38
§ 3	55
Civil Rights Act of 1871, Act of April 20, 1871, ch.	
22, 17 Stat. 13	<i>passim</i>
§ 1	16, 50, 55

(viii)

Civil Rights Act of 1957, 71 Stat. 634, P.L. 85-315	42
§ 121	42, 44, 48
§ 122	42, 45, 48
§ 131(c)	44
Civil Rights Act of 1964, § 207(b), 78 Stat. 243	36
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§ 629(16)	17, 51
§ 1977	51
§ 1979	17, 34, 36, 51
§ 1989	45
Revision of Statutes Act of 1874, ch. 233, § 21, 18 Stat. 113	36
Act of March 3, 1875, 18 Stat. 470	52
Act of March 3, 1911, ch 231, 36 Stat. 1087 36 Stat 1091	52

Federal Regulations:

45 C.F.R. 233.20(a)(3)(ii)(c)	4, 9, 14, 34
45 C.F.R. 234.60	29

New York Statutes:

New York Social Services Law § 131-a	6
New York Social Services Law § 350(1)(a)	27
New York Social Services Law § 350(j)	30

New York Regulations:

18 N.Y.C.R.R. § 352.7(g)(7)	4, 5, 9, 12
18 N.Y.C.R.R. § 352.7(g)(5)	9
18 N.Y.C.R.R. § 381 et seq.	29

Congressional Materials:

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p. 505	54

(ix)

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11838	45
12284	45
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12304	45
12307	45
12314	46
12449	43
12564	46
16112	47
16203	48
16478	47
16620	47
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§121	<i>passim</i>
§122	42, 46, 48
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-6476

CYNTHIA HAGANS, for herself and her two infant children, KIMBERLY and KOREY; BERTHA GRISSETT, for herself and her five infant children, DEBORAH, ANGELO, WILLIAM, LINDA and CYNTHIA; KATHRYN ZAVERZENEC, for herself and her infant child, DANA LYNN; KAREN HORNECK, for herself and her infant child, TODD, and her intrauterine child yet unnamed; EURLEEN CARSON, for herself and her two infant children, TIMOTHY and CALVIN; BARBARA SIEMILLER, ELIZABETH ELY and BARBARA LYNCH, as individuals and on behalf of all other persons similarly situated,

Petitioners,

v.

ABE LAVINE, as Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, as Commissioner of the Nassau County Department of Social Services,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONERS

OPINION BELOW

The opinion of the Court of Appeals [A-120-124] * is reported at 471 F.2d 347 (2d Cir. 1973).

*Numbers in parenthesis preceded by "A" refer to pages of the Appendix.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals for the Second Circuit, remanding the case to the District Court with instructions to dismiss for want of jurisdiction, was entered on January 8, 1973. The petition for a writ of certiorari was filed on March 31, 1973, and certiorari was granted on June 11, 1973. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment of the United States Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

28 U.S.C. 1343(3) and (4) in pertinent part provides:

"The District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act

of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. §602 in pertinent part provides:

"(a) A state plan for aid and services to needy families with children must:

* * * * *

(7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual [living in the same home as such child and relative] whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income;

* * * * *

(10) provide, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals."

RULES AND REGULATIONS

45 C.F.R. § 233.20(a)(3)(ii)(c) in pertinent part provides:

"(a) *Requirements for State Plans.* A State Plan for OAA, AFDC, AB, APTD or AABD must

* * * * *

(3)(ii) provide that, in establishing financial eligibility and the amount of the assistance payment: * * *

(c) only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered, ..."

18 New York Code of Rules and Regulations — § 352.7(g)(7) in pertinent part, provides as follows:

"(g) *Payment for services and supplies already received.*

Assistance grants shall be made to meet only current needs. Under the following specified circumstances payment for services or supplies already received is deemed a current need.

(7) For a recipient of public assistance who is being evicted for nonpayment of rent for which a grant has been previously issued, an advance allowance may be provided to prevent such eviction or rehouse the family; and such advance shall be deducted from subsequent grants in equal amounts over not more than the next six months. When there is a rent advance for more than one month, or more than one

rent advance in a 12 month period, subsequent grants for rent shall be provided as restricted payments in accordance with Part 381 of this Title."

QUESTIONS PRESENTED

The Court of Appeals for the Second Circuit found that "because no substantial constitutional claim was presented, the district court was without jurisdiction to consider the statutory claim urged by plaintiffs". [A-124]. The questions presented to this Court, therefore, are:

1. Does the complaint challenging New York's welfare recoupment regulation [18 N.Y.C.R.R. §352.7(g)(7)] as violative of the equal protection and due process clauses of the Fourteenth Amendment present substantial constitutional claims sufficient to support federal court jurisdiction to determine the pendent statutory claim under 28 U.S.C. §1343(3)?

2. Did the district court have jurisdiction pursuant to 28 U.S.C. §§1343(3) and 1343(4) over the statutory claim founded on 42 U.S.C. §1983 and seeking to declare the New York regulation violative of the Social Security Act, even absent a substantial constitutional question?

STATEMENT OF THE CASE

In 1971, the New York State Department of Social Services promulgated Section 352.7(g)(7) of Title 18 of the New York Code of Rules and Regulations.¹ The

¹The regulation originally numbered 18 N.Y.C.R.R. §352.7(g)(6) was renumbered 18 N.Y.C.R.R. §352.7(g)(7) effective December 10, 1971, states as follows:

regulation was submitted to HEW for approval as part of the New York State plan. In November 1971, and again on December 29, 1971, the Regional Commissioner apprised the State that the regulation does not conform to federal requirements. [A-67-68]. Although the regulation has never received HEW approval, New York has nevertheless, continued to give the regulation state-wide application, to all categories of assistance. In addition, the State claims and receives federal funds, notwithstanding its non-compliance with federal requirements.

Appellants and their dependent children are recipients of public assistance under New York's Aid to Dependent Children program [ADC], and receive monthly grants calculated to provide 90% of their familial sustenance needs.²

“(g) Payment for services and supplies already received.”

Assistance grants shall be made to meet only current needs. Under the following specified circumstances payment for services or supplies already received is deemed a current need:

* * * * *

(7) For a recipient of public assistance who is being evicted for nonpayment of rent for which a grant has been previously issued, an advance allowance may be provided to prevent such eviction or rehouse the family; and such advance shall be deducted from subsequent grants in equal amounts over not more than the next six months. When there is a rent advance for more than one month, or more than one rent advance in a 12 month period, subsequent grants for rent shall be provided as restricted payments in accordance with Part 381 of this Title.”

²New York, as do all other states, participates in the federal program of Aid to Families with Dependent Children (AFDC) under the Social Security Act of 1935. Section 131-a of the New York Social Services Law, [McKinney Supp, 1972] provides for a schedule of payments to families with dependent children based on the number of individuals in the household. The statewide standard

Appellant CYNTHIA HAGANS, and her two infant children received a shelter allowance from the Nassau County Department of Social Security in the sum of \$165.00, the maximum allowance for her size family under the social service district's rent schedule. Because of an acute housing shortage, appellant HAGANS was unable, and the State has so conceded, to obtain housing at the scheduled allowance. [A-34]. She rented an apartment in Massapequa, New York at a cost of \$200.00 monthly. She was unable to make up this \$35.00 difference with the limited funds allotted for the family's basic needs. As a result, she accumulated arrears and was unable to pay the December 1971 rent. She was evicted from her apartment in January 1972. The same month an emergency rent disbursement of \$175.00 was made by the Nassau County Department of Social Services to rehouse the family. This payment was recovered in full during the subsequent month leaving appellant HAGANS and her two children with but \$17.00 for an entire month's basic needs. [A-33-37]

Each appellant, for various reasons, was unable to pay her rent, and was threatened with eviction for non-payment.³ To prevent eviction, emergency rent payments

of need, is, that sum of money minimally required to sustain life, including food, clothing, utilities, furniture, household supplies, laundry and personal expenses. Each social service district establishes a maximum schedule of monthly shelter allowances which is added to the basic needs grant. In July, 1971, New York enacted a 10% ratable reduction in the level of benefits and now pays recipients 90% of the standard of need.

³The regulation mandates recoupment regardless of fault. While the district court noted that the named-plaintiffs were without fault in the management of the proceeds of their grants [A-73 n.5] the court also observed that "Recipients threatened with eviction are in default for a variety of reasons; at times it is mismanagement

were made by the local Department of Social Services, at times without even appellants' knowledge or consent. (A-33-37, 113). These payments characterized as "advances" by the State, were deducted or "recouped" from appellants' subsequent familial grants of assistance pursuant to the mandate of the recoupment regulation.⁴ During the period of recoupment, when the grant for basic needs was reduced, appellants had no other additional income or resources to meet the families' basic needs. [A-33-37].

The History of These Proceedings

On February 10, 1972, appellants commenced this action in the United States District Court for the Eastern District of New York, individually, on behalf of their infant children, and as representatives on behalf of recipients of New York's Aid to Dependent Children similarly situated. Appellants challenged the validity of the New York recoupment regulation on constitutional and statutory grounds and sought both injunctive and declaratory relief pursuant to 42 U.S.C. §1983 and 28

of the funds allotted; at times it is for reasons beyond their control." [A114-115]. Moreover, evictions for non-payment of rent may really be the "fault" of the low welfare grants, which are 90% of needs in New York. Indeed, CYNTHIA HAGANS' difficulty arose because her shelter allowance was below her actual rent needs.

⁴ Although the State argues that the recoupment regulation does nothing but provide a convenient method of recovering the "advance" allowance, such contention does not withstand scrutiny, inasmuch as the Social Security Act explicitly prohibits "advance" allowances in the form of accelerated payments or repayable loans. It deals only in terms of present need, as determined each month. [A-59, 115, 116].

U.S.C. §2201. The jurisdiction of the Court was invoked under 28 U.S.C. §1343(3) and (4). The constitutionality of the regulation was subjected to a two-fold challenge under the equal protection and due process clauses of the Fourteenth Amendment. Appellants contended that the regulation is violative of the equal protection clause because it arbitrarily and irrationally divides children receiving benefits under New York's Aid to Dependent Children [ADC] program into two classes, indistinguishable from one another in need or eligibility, and invidiously imposes deprivation on one of those classes [children whose parents have required and received emergency rent payments] by depriving them of the state-defined level of minimum subsistence for as much as 6 months.⁵ [A-13, 14].

Appellants claimed that the regulation is violative of the due process clause of the Fourteenth Amendment because it is vague and without standards; and creates an irrebuttable presumption of mismanagement contrary to fact. [A-14]. Appellants' statutory claim alleged that the recoupment regulation contravenes the Social Security Act §402(a)(7) and §402(a)(10), 42 U.S.C. §602(a)(7) and §602(a)(10) as well as the HEW regulations promulgated thereunder, 45 C.F.R. §233.20(a)(3)(ii)(c) because it assumes contrary to fact, that those funds extended to a

⁵The challenged regulation contains no standards governing implementation and thus permits full recoupment to take place in but a single month, [A-51] with devastating consequences upon the family's well-being, as was done in the case of CYNTHIA HAGANS [A-34]. By the terms of the regulation more than one recoupment can take place during the same period. In addition, more than one type of recoupment may be imposed at the same time since New York regulations also mandate recoupment of emergency utility payments furnished to prevent a shut-off or restore utility services. See 18 N.Y.C.R.R. . §352.7(g)(5).

recipient in one month to meet a current emergency rent need, remain available as income for the family's need during the six month recoupment period. [A-11-13].

The district court [Mishler, C.J.] found that the constitutional claim charging a violation of the equal protection clause of the Fourteenth Amendment was substantial and the basis for pendent jurisdiction to determine the statutorily-based claim under 42 U.S.C. §1343(3). [A-68]. At the trial, the State adduced the testimony of Arthur J. Doring, a consultant with the State Department of Social Services with respect to the policy and intent of the regulation.⁶ After ruling the action properly maintainable as a class action, the court declared the recoupment regulation to be violative of the Social Security Act and HEW regulations and enjoined its implementation or enforcement. [A-75, 76]. The State appealed.

On appeal, the Court of Appeals for the Second Circuit unanimously found jurisdiction under 28 U.S.C. §1343(3). [A-81]. The majority court concluded, however, that the order of the district court should be vacated and the case remanded to the trial court to determine "whether recoupment of past advances from current grants is a 'reduction in grant' so as to bring into effect New York fair hearing procedures." [A-82].⁷ On

⁶Appellants withdrew their motion for the convening of a three judge court and the parties consented to an expedited trial on the merits before a single district court judge pursuant to Rule 65 (a)(2) of the Federal Rules of Civil Procedure.

⁷Judge Lumbard, dissenting, found no purpose to be served by the remand since the regulation mandates recoupment without exception where duplicate rent payment is made and fair hearings would serve no purpose. On the merits, Judge Lumbard found the recoupment regulation to be consistent with the Social Security Act. [A-83].

remand, the district court, with the consent of the parties, granted leave for additional parties to intervene and file a complaint. [A-112].⁸ The court on July 19, 1972, invited the Department of Health, Education and Welfare to participate in the action as *amicus curiae*.⁹ On October 19, 1972, the district court [Mishler, C.J.] again held the recoupment regulation invalid as violative of the Social Security Act and HEW regulations, and enjoined its enforcement and implementation. [A-112-117]. The State appealed.

On appeal, the Court of Appeals for the Second Circuit, without deciding the merits of the action and without offering any basis to distinguish its holding from that of the Second Circuit panel in *Hagans I*, [462 F.2d 928, 930] or of federal courts in the various circuits which have found substance to similar constitutional claims, held that the district court did not have jurisdiction to reach the pendent statutory claim because "no substantial constitutional claim was presented." The

⁸By the time of the remand, the original named plaintiffs had received full reimbursement of the moneys wrongfully recouped, in accordance with the injunction granted by the district court, and therefore, neither required nor requested fair hearings. While only two intervenors, BARBARA SIEMILLER and ELIZABETH ELY had requested and received fair hearings, the district court concluded that inasmuch as "[t]he pertinent section mandates recoupment if it is established that duplicate payments have been made to avoid threatened eviction. . . if fair hearings were afforded (all) the members of the class, the determination would be the same as in SIEMILLER." [A-115].

⁹HEW, in its *amicus* brief, concluded that "the New York Regulation contravenes federal requirements because it assumes for particular months the existence of income and resources which by definition are not currently available for such months". Brief for HEW as *amicus curiae* at 2A. A copy of the *amicus* brief may be found in Appendix A of this brief.

Court remanded the case to the district court with instructions to dismiss for want of jurisdiction. [A-120-124].

SUMMARY OF ARGUMENT

I

The district court concluded that the complaint pleaded a substantial constitutional claim and properly exercised pendent jurisdiction over the Social Security Act claim pursuant to 28 U.S.C. §1343(3). The guidelines for determining whether constitutional claims are of sufficient substance to support federal jurisdiction are well defined by the unbroken line of decisions of this Court. Unless claims are so attenuated as to be "absolutely devoid of merit", *Baker v. Carr*, 369 U.S. 186, 189, or previous decisions of the Court have rendered them "inescapably" frivolous, leaving no room for the inference that the questions sought to be raised can be the subject of controversy, they must be deemed *substantial* for the purpose of determining the threshold question of jurisdiction. *Goosby v. Osser*, 409 U.S. 512, 518.

We submit that application of the *Goosby* standard to the two-fold constitutional challenge presented here in the complaint, demonstrates that the claims are substantial, as was recognized by the district court, the court of appeals panel in *Hagans I*, and the district courts in other circuits which found substance to these claims and invoked federal jurisdiction to strike down similarly-styled regulations.

The challenged recoupment regulation [18 N.Y.C.R.R. §352.7(g)(7)] operates to create two classes of needy children receiving benefits under New York's Aid to Dependent Children [ADC] program and imposes deprivation on one of those two classes that lacks rational

relation to, and indeed frustrates attainment of, the paramount goal of the Social Security Act, namely, the protection of needy, dependent children. *King v. Smith*, 392 U.S. 309. In New York, any child in an ADC family whose parent receives an emergency rent payment to forestall an eviction is denied the state-determined level of sustenance for as long as six months to enable the state to recover the rent payment, while assistance commensurate with the state-determined needs is afforded to all other children. It is this distinction that appellants argue is "not rationally based and free from invidious discrimination," *Dandridge v. Williams*, 397 U.S. 471, and is violative of the equal protection strictures. The recoupment regulation punishes children, not because of any conduct of their own, but solely because of their parents' conduct. *Levy v. Louisiana*, 391 U.S. 68, 72. Treating needy children, otherwise similarly situated, differently because of their parents' conduct is not an example of "rationality" but of "arbitrary . . . choice." *Reed v. Reed*, 404 U.S. 71, 76-77. Depriving children of the means to sustain themselves for as long as six months to further the state's proffered interest, teaching their parents proper money management, is *not in fact* rationally related to any legitimate state interest, particularly in light of the non-punitive rehabilitative measures which both Congress and New York have established to deal with the problem of mismanagement. Cf. *United States Dept. of Agriculture v. Moreno*, 93 S.Ct. 2821. The vague and standardless regulation is also challenged as violative of the due process clause because it deprives children of statutory entitlements on the basis of conclusive presumptions, contrary to fact, [i.e., that recipients who receive emergency rent payments have mismanaged their grants; that funds extended to a recipient in one month to meet an emergency rent need

remain available as a resource to meet his current needs during the period of recoupment] without due process of law. *Bell v. Burson*, 402 U.S. 535.

Appellants also challenged the regulation as being in conflict with the Social Security Act and HEW regulations which mandate that states "shall in determining needs, take into account any income or resources . . ." of the child or relative, Social Security Act 402(a)(7), 42 U.S.C. 602(a)(7), and in determining the amount of the grant shall consider "only such income as is actually available for current use on a regular basis. . . ." 45 C.F.R. §233.20(a)(3)(ii)(c). In the view of HEW, as expressed in its *amicus* brief, and in the view of the district court which permanently enjoined its enforcement, the recoupment regulation contravenes federal requirements.

The court below erroneously concluded that the constitutional claims were insubstantial on the basis of *Dandridge v. Williams*, *supra*, for as we have demonstrated the challenged classification fails even to satisfy the *Dandridge* standard—"rationally based and free from invidious discrimination." Moreover, reliance on *Dandridge* as determinative of the due process claim is even more unavailing since that decision is limited to equal protection analysis. Given its broadest application, *Dandridge* gave the court below reason to question or doubt appellants' ultimate success on the merits of the equal protection claim. But as this Court clearly noted in *Goosby*, such doubt may not serve as the basis for determining that constitutional claims are insubstantial.

II

The district court properly exercised jurisdiction over appellants' Social Security Act claims whether or not the complaint pleaded a substantial constitutional claim. 42 U.S.C. §1983 provides for a civil action to redress the deprivation under color of state law of any right, privilege, or immunity secured by the Constitution and laws of the United States. Appellants sought to redress rights secured to them by one such federal "law," the Social Security Act, namely, the right to receive AFDC benefits to which they are entitled and computed without any assumptions as to the availability of income and resources which they do not have, a right secured by § §402(a)(7) and (10) of the Act, 42 U.S.C. § §602(a)(7), (10).

28 U.S.C. §1343(4) provides for jurisdiction over claims brought under "any Act of Congress providing for the protection of civil rights." Section 1983 is such an Act. It protects civil rights by providing civil remedies [equitable and damages] for their deprivation by state officials, and by providing a federal forum to enforce those rights which may be utilized without regard to the availability of parallel state remedies. Among the "civil rights" protected by §1983 is the right to acquire and possess property. The right to possess government benefits according to the terms set forth by Congress is surely such a right.

This Court has recently recognized that §1983 is an act which protects civil rights within the meaning of §1343(4). The Court distinguished §1983 from §1988 which does not protect civil rights by itself, but only in cooperation with §1983 and other statutes which do protect civil rights. *Moor v. County of Alameda*, ___ U.S. ___, 93 S.Ct. 1785, 1792 (1973). The second circuit has

rejected this interpretation solely on the basis of the personal liberty/property rights distinction now rejected by this Court.

The only doubt as to the applicability of § 1343(4) to suits such as this is a reference in the House Report referring to § 1343(4) as a "technical amendment" to conform to "amendments made to existing law by the preceeding section of the bill." The "preceeding section" was *not* enacted, however, and this explanation thus provides the Court no guidance. In any case, the plain language of the section goes so far beyond the purported function ascribed to it by the Committee, even had the preceeding section been passed, as to require the Court to give the words their natural meaning, particularly in light of certain legislative history indicating that the section was, indeed, intended to *expand* federal jurisdiction. In fact, § 1343(4) was specifically retained on the floor of the Senate after its elimination had been proposed along with other parts of the Bill, in an exchange for liberal support for another proposed amendment. Finally, this Court has read § 1343(4) as expansive of federal jurisdiction by relying on it to afford jurisdiction in a private § 1982 housing discrimination case, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), a case in which no other basis for jurisdiction was available.

28 U.S.C. § 1343(3) also provided jurisdiction. While § 1983 establishes a remedy for violations of any federal law by state officials, § 1343(3) provides for jurisdiction where the right asserted is under any Act of Congress "providing for equal rights." Section 1983 is such an Act.

The predecessor to § 1983, § 1 of the 1871 Civil Rights Act, provided for concurrent jurisdiction in the district and circuit courts for *all* § 1983 cases. In 1874, the Revised Statutes placed the substantive provision of § 1

in R.S. §1979 (now §1983) and the jurisdictional provisions in R.S. §563(12) (district court) and R.S. §629(16) (circuit court). The district court provision specifically authorized jurisdiction for claims to redress deprivations of "any right secured by *any* law of the United States," but the circuit court provision contained the "equal rights" language now found in §1343(3). There was no explanation for the different language used, nor any indication that the circuit courts were to exercise a more limited jurisdiction.

When the revisers of the Judicial Code abolished the circuit court's original jurisdiction in 1911, the "equal rights" language was used for the district court's jurisdictional grant. The revisers gave no indication of an intent to retract the district court's power in civil rights cases, and the Senate Committee noted only that it had "merged" the jurisdiction of the two courts.

The apparent anomaly of a federal remedy having been created without federal court jurisdiction does not really exist since §1983 is itself an "equal rights" statute within the meaning of §1343(3). This Court has noted that the momentum behind §1983 was "not the unavailability of state remedies but the failure of certain states to enforce the laws with an equal hand." Section 1983, by providing a federal remedy and federal forum, secured, for those unable to obtain it from the state courts, equal treatment before the law.

The Court should find jurisdiction under §1343 to preserve the primary, if not exclusive, historical purpose of the section, i.e., to provide a federal *judicial* remedy for state inspired transgressions of federally created or guaranteed rights. See *Mitchum v. Foster*, 407 U.S. 225, 239 (1972); *Monroe v. Pape*, 361 U.S. 167. A federal forum is particularly critical where complex federal

statutes are involved, federal funds are expended thereunder, and uniform and sympathetic interpretation essential to the statute's successful administration. An adverse interpretation may leave recipients in some states without a remedy when filing fees are imposed in their state courts, or where state courts do not have sufficient equitable jurisdiction to provide an adequate remedy.

ARGUMENT

POINT I

APPELLANTS' COMPLAINT PRESENTS SUBSTANTIAL CONSTITUTIONAL QUESTIONS ESTABLISHING FEDERAL COURT JURISDICTION

A. The Procedural Posture

The courts below differed as to whether the constitutional claims presented were substantial.¹⁰ The court of appeals concluded that the "district court was without jurisdiction to determine the statutory claim urged by plaintiffs" because the case presented no substantial constitutional claim.¹¹ The procedural posture of this case delineates the issue in this Court.

The question here is not the ultimate disposition of the constitutional or statutory claims raised by the complaint, but rather the threshold question, whether these claims are of sufficient substance to support federal jurisdiction.

¹⁰Both the district court [A66-68] and the court of appeals in *Hagans I* [462 F.2d 928, 930] [A-81] found the constitutional claims presented of sufficient substance to support federal jurisdiction.

¹¹The accuracy of calling such dismissals jurisdictional has been questioned by the court on several occasions. See, e.g., *Rosado v. Wyman*, 397 U.S. 397, 404 (1970).

Appellants presented three basic claims in their complaint. They challenged: (1) the recoupment regulation is violative of the equal protection clause of the Fourteenth Amendment because the regulation creates two classes of needy children receiving benefits under New York's Aid to Dependent Children program. Children whose parents received an emergency rent disbursement in a prior month to prevent eviction and loss of housing, which payment has been expended and is no longer available to meet their current needs, are denied the state-determined level of assistance for as long as six months. All other needy children are afforded full assistance commensurate with the state-determined level of assistance. It is this distinction which appellants submit is not "rationally based and free from invidious discrimination", *Dandridge v. Williams*, 397 U.S. 471, 487 (1970), and therefore, denies the equal protection of the laws; (2) the recoupment regulation is violative of the due process clause of the Fourteenth Amendment because it deprives appellants of statutory entitlements without their being afforded due process of law. The regulation creates irrebuttable presumptions contrary to fact, i.e., that all recipients who receive emergency rent payments have mismanaged their shelter allowances; that these emergency rent payments remain available as a resource to meet current needs during the period of recoupment. By not permitting recipients to rebut these presumptions, the State has denied them due process of law, *Bell v. Burson*, 402 U.S. 535 (1971); *Heiner v. Donnam*, 285 U.S. 312 (1932);¹²

¹²The due process claim was manifold. In addition, the regulation was challenged as "vague and standardless" since welfare officials are left at large to speculate as to the meaning and application of the recoupment regulation. The regulation, therefore, transgresses the bounds of fundamental fairness. *Cf. Giaccio v. Pennsylvania* 382 U.S. 399 (1966).

and (3) the regulation is violative of the Social Security Act and HEW regulations because it assumes, contrary to fact, that funds extended to a recipient to meet a current emergency rent need remain available as income for the family's needs during the subsequent period of recoupment. See *Lewis v. Martin*, 397 U.S. 552, 559 (1970).

The district court found the equal protection claim substantial and the basis for jurisdiction pursuant to 28 U.S.C. §1343(3) over the cause of action authorized by 42 U.S.C. §1983 and accepted pendent jurisdiction over the statutory claim. See *Rosado v. Wyman*, 397 U.S. 397 (1970).

The court below cited no controlling authority to support its conclusion that the constitutional questions were insubstantial. Moreover, the opinion is limited to a brief analysis of the equal protection claim, and thus it is not clear whether the court *sub silentio* has declared the due process claim to be insubstantial as well.

Appellants contend that the court below erred in concluding the constitutional claims to be insubstantial, and that application of the standards expressed by this Court for determining whether substantial questions are presented, require a reversal here. We show in this brief that the complaint raises substantial non-frivolous constitutional questions and that the district court had jurisdiction under 28 U.S.C. §1343(3). Appellants will demonstrate that even if the Court below correctly concluded that the complaint fails to raise substantial constitutional questions, the district court had jurisdiction to determine the statutorily-based claim under 28 U.S.C. §1343(3) and (4) and 42 U.S.C. §1983.

Despite differences in language between §1343(3) and §1983, the legislative history indicates that the scope of the two sections was intended to be co-extensive. Thus, §1343(3) provides jurisdiction for all causes of action

under §1983. Furthermore, jurisdiction over the Social Security Act claim exists under §1343(4) since §1983 is an act "providing for the protection of civil rights".

B. Standards of Review:

Goosby v. Osser, 409 U.S. 512

Article III, §2 of the federal constitution provides that "The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, ..." Congress has exercised its power to assign jurisdiction to the district courts in 28 U.S.C. §1343(3):

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person ... [to] redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States. ..."

42 U.S.C. §1983 creates a cause of action to challenge the conduct of persons who, under color of state law, deprive the claimant of "any rights, privileges, or immunities secured by the Constitution and laws, ..."

Simply stated, "[J]urisdiction is authority to decide the case either way." *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913). In determining the threshold question of jurisdiction, the court's inquiry is restricted to "whether, upon the allegations of the bill of complaint, assuming them to be true in point of fact, a Federal question is disclosed so as to give the ... court jurisdiction. ..." *Vicksburg Waterworks Co. v. Vicksburg*, 185 U.S. 65, 82 (1902). In determining this jurisdictional question, a court must look to the complaint to ascertain whether it sets forth a claim arising

under the Constitution and laws of the United States so as to satisfy the requirements of 28 U.S.C. §1343. It is clear from a reading of the complaint that the appellants' claims arise under the Constitution and laws of the United States. The complaint alleges that the New York regulation deprives the appellants of due process and the equal protection of the laws in violation of the Fourteenth Amendment and violates the provisions of the Social Security Act.

Jurisdiction is not defeated by the possibility that the pleadings fail to state a cause of action on which the appellants could actually recover. "For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action upon which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy." *Bell v. Hood*, 327 U.S. 678, 682 (1946).

This Court in *Baker v. Carr*, 369 U.S. 186, 199 (1962), stated: "[d]ismissal of the complaint upon the ground of lack of jurisdiction of the subject matter would, therefore, be justified only if that claim were 'so attenuated and unsubstantial as to be absolutely devoid of merit', ..." [citation omitted].

The decisions of this Court establish that dismissal for want of jurisdiction is appropriate only where the alleged claim under the Constitution or federal statute is patently without merit and "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such claim is wholly insubstantial and frivolous." *Bell v. Hood*, *supra*, 327 U.S. at 682-83.

Recently in *Goosby v. Osser*, 409 U.S. 512, 518 (1973), the Court articulated the standard to be applied

by the courts in determining whether constitutional claims are substantial.

The lower court had erroneously determined that the constitutional claim had been rendered insubstantial by an earlier decision. This Court considered such limiting words as "wholly without merit" and "obviously without merit" in the context of determining the effect of prior decisions upon the substantiality of constitutional claims and finding them to have particular significance, stated:

"... those words import that claims are constitutionally insubstantial only if prior decisions inescapably render the claims frivolous; previous decisions which merely render claims of doubtful or questionable merit do not render them insubstantial. ..."

Given this standard, we maintain that in view of the pertinent case law, the stipulated facts, and the allegations of appellants' complaint which must be accepted as true, *Boddie v. Connecticut*, 401 U.S. 371, 373 (1971), the court below erred in dismissing the complaint for lack of jurisdiction. The finding of jurisdiction by the Court of Appeals in *Hagans I*, and the decisions of district courts in several circuits which have found these constitutional claims to be non-frivolous and of substance, strongly support our contention that the court below erroneously determined the threshold question of jurisdiction.

C. Substantial Constitutional Questions Are Presented

The court below erroneously concluded that the decision in *Dandridge v. Williams*, *supra*, 397 U.S. 471, rendered the constitutional claims insubstantial. The holding of this Court in *Dandridge*, which involved the validity of maximum grant provisions, is not dispositive

of the claims presented by appellants' complaint.¹³ In *Dandridge*, the Court determined that equal protection challenges to welfare legislation are to be tested by the minimum rationale standard of review. The consideration of the facts and circumstances behind the law, as well as the balancing of state interests protected and the interests of those disadvantaged, [not substantiated by evidence in the record] by the court below is, in fact, a recognition that a "non-frivolous" and "substantial" claim was presented. Such analysis should properly be confined to determining the merit of the claim, after the finding of jurisdiction. Cf. *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). Application of the standard articulated in *Dandridge v. Williams*, *supra* at 487—that the statute be "rationally based and free from invidious discrimination", requires a finding that the constitutional claims are substantial.

1. *The denial of the State-determined level of assistance to needy children receiving benefits under the Aid to Dependent Children Program is not rationally based and constitutes invidious discrimination.*

The New York recoupment regulation operates to create two classes of needy children receiving benefits under the State's Aid to Dependent Children program. Children whose parents receive an emergency rent payment to forestall an eviction or secure housing, are denied the state-determined level of assistance for as long as six

¹³The court of appeals' disposal of the due process claim on the basis of *Dandridge* is even more unavailing for that decision rested by its own language squarely on equal protection and not due process. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Boddie v. Connecticut*, *supra*.

months during the period of recoupment. All other needy children under the ADC program receive full assistance commensurate with the state-determined level of benefits. The recoupment regulation thus creates classifications of children on the basis of their parents' conduct, over which they have no control, "contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." *Weber v. Aetna Casualty and Surety Company*, 406 U.S. 164, 175 (1972). We submit that this classification is not "rationally based and free from invidious discrimination," *Dandridge v. Williams*, *supra* at 487 and therefore, denies the equal protection of the laws.

2. *The classification is not "rationally based"*

At the threshold, the equal protection Clause "imposes a requirement of some rationality in the nature of the class singled out." *Rinaldi v. Yeager*, 384 U.S. 305, 308-309 (1966). The challenged classification does not satisfy this standard.

Appellants' children were not deprived of the state-determined level of sustenance because they were less eligible or needy than their peers receiving benefits under the ADC program. Indeed, so far as the record discloses, each is indistinguishable from his peers. The deprivation of the means of minimum sustenance for as long as six months because of their parents' conduct is an example, not of "rationality", but instead an "arbitrary ... choice" by which the State provides "dissimilar treatment for [children] who are ... similarly situated. ..." *Reed v. Reed*, 404 U.S. 71, 76-77 (1971). The classification of children on the basis of parental conduct is "arbitrary and irrational. ..." *Lindsey v. Normet*, 405 U.S. 56, 79 (1972).

a) The regulation violates the mandated goals
of the Social Security Act

The rationality of the classification must be assessed in light of the purposes of the Social Security Act. In making funds available to the states for public assistance purposes, the Congress meant to attain these purposes, and states, in administering public assistance, must observe these policies. *King v. Smith*, 392 U.S. 309 (1968); *Townsend v. Swank*, 404 U.S. 282 (1971).

While the State no doubt has a valid interest in deterring mismanagement, "the means chosen to accomplish this interest conflict with a primary purpose of the [Social Security] Act and effectively punish the needy child for parental mismanagement. If the purpose of the AFDC program were to train needy individuals in the proper techniques of money management, the New York advance or duplicate assistance policy might not present a problem. However, that is not a primary purpose of the Act." [Brief for HEW as *amicus curiae*, at 11.] Elaborate argument is unnecessary to establish that the recoupment regulation and the deprivation it imposes upon needy children bear no rational relation to the mandated and "paramount goal of AFDC", providing basic financial protection to needy, dependent children. *King v. Smith*, *supra* at 325. Similarly styled state recoupment regulations have been declared by federal courts not to be rationally related to the mandated goals of the child-oriented AFDC program. See, *Cooper v. Laupheimer*, 316 F. Supp. 264, 269 [E.D. Pa. 1970]; accord *Bradford v. Juras*, 331 F. Supp. 167 [D. Ore. 1971].¹⁴

¹⁴In *Holloway v. Parham*, 340 F. Supp. 336 [N.D.Ga. 1972] the court found the equal protection challenge to a recoupment regulation to be substantial and the basis for jurisdiction. The

b) The recoupment regulation is destructive of overriding State objectives

The classification cannot be justified as "rationally based" on the ground that depriving needy children of the means to survive for as long as six months "encourages proper money management". The court below found this to be an entirely acceptable purpose. However, this approach entirely misconceives the issue by fastening upon but one element in a complex system of public welfare. One might even concede [we do not] that the regulation, in fact, advanced that limited purpose. Starving children to encourage proper money management by their parents is destructive of other, and appellants submit, overriding state objectives. New York's Constitution mandates that "[t]he aid, care and support of the needy are public concerns" N.Y. Const., art. XVII, § 1. The Legislature has expressed its concern that allowances "shall be adequate to enable the father, mother or other relative to bring up the child or minor properly, having regard for the physical, mental or moral well-being of such child" N.Y. Social Services Law §350(1)(a). [McKinney Supp. 1972]. "The interest of the child has been ever paramount." *Crowley v. Bressler*, 181 Misc. 59, 63 [Sup. Ct. 1943]. Manifestly, the deprivation visited upon the child, solely because of his parents' conduct, is contrary to the concern for the aid

regulation challenged therein was declared consistent with the Social Security Act because, unlike New York's regulation, it required that Georgia consider the need of dependent children and waive repayment where it would deprive needy children of subsistence. The court declared that the regulation did not permit current assistance to be reduced to recover prior overpayments unless the recipient had income or resources in the amount of the proposed reduction.

and care of needy, dependent children, which is the overriding purpose of the state program of ADC. By punishing the target and primary beneficiary of the ADC program, "the state spites its own articulated goals. . . ." *Stanley v. Illinois*, 405 U.S. 645, 653 (1972).

c) The classification is not free from
invidious discrimination

It is equally evident that the classification is invidiously discriminatory. The Fourteenth Amendment rights of children are burdened because of their parents' conduct. But "it is invidious to discriminate against them when no action, conduct, or demeanor of theirs is possibly relevant to the harm [thus done to them]" *Levy v. Louisiana*, 391 U.S. 68, 72 (1972).

The State places principal reliance on its argument that "it is plainly reasonable to require repayment of monies advanced as a means of encouraging welfare recipients to learn proper money management and to deter recipients from misallocating funds." [Respondent's Brief in opposition to certiorari at 10.] The flaw in this argument is manifest by the fact that the regulation is not limited to mismanagement, but mandates recoupment regardless of fault whenever the emergency rent disbursement is made.¹⁵ In addition, the State is in the anomalous

¹⁵Both the district court and the court of appeals in *Hagans I* accurately noted that duplicate rent payments result not only from fault or mismanagement, but that "[r]ecipients threatened with eviction are in default for a variety of reasons; at times it is mismanagement of the funds allotted, at times it is for circumstances beyond their control." [A-115]. Moreover, at the trial, Arthur Doring, a consultant with the New York State Department of Social Services conceded that persons [such as CYNTHIA HAGANS] whose actual rent exceeded the allowance and who required duplicate payments, were not to be charged with mismanagement, but would, nevertheless, fall within the terms of the recoupment regulations. [A-53].

position of contending that the regulation was promulgated to deter mismanagement of shelter allowances and prevent costly motel placements, [A-40-41] while acknowledging that recipients who have mismanaged their grants and require motel placement are exempt from the operation of the regulation. [A-63].

The arbitrariness of the classification would alone be sufficient to establish that the State has "impose[d] a regime of invidious discrimination. . . ." *Dandridge v. Williams*, *supra* at 483. Appellants note also that there are alternatives available to deal with the proffered interest which are non-destructive of the larger state purpose. Consideration of these alternatives is proper. *Carrington v. Rash*, 380 U.S. 89 (1965); *Lindsey v. Normet*, 405 U.S. 56 (1972).

Congress recognized that mismanagement of grants was a problem and established several non-punitive measures to deal with the problem, [none of which includes recoupment] in ways that further, rather than frustrate, the purpose of the AFDC program. The existence of these rehabilitative measures to deal with the problem of mismanagement necessarily casts considerable doubt that this regulation could be rationally intended to prevent the same abuses.¹⁶ *United States Dept. of Agriculture v. Moreno*, 93 S.Ct. 2821, 2827 (1973). The State has argued that the recoupment regulation is the only means

¹⁶The Social Security Act requires that state plans make provision in appropriate cases for providing aid to dependent children in the form of "protective payments" or "vendor payments" See Social Security Act §402(a)(15)(B)(ii); 42 U.S.C. §602(a)(15)(B)(ii); Social Security Act 406 (b)(2); 42 U.S.C. §606(b); 45 C.F.R. 234.60. New York has established three ways to deal with the problem of mismanagement [counselling, protective payments, family court proceedings]. See 18 N.Y.C.R.R. §381.

available to preserve needed housing. [A-63]. The State has deliberately disregarded the availability of emergency assistance to avoid destitution.¹⁷ "Emergency assistance is designed to take care of the same sort of situation which §352.7(g)(7) covers, such as recipient's loss of housing." [Brief for HEW as *amicus curiae* at 14A.]

D. No Prior Decisions of the Court "Inescapably Render the Claims Frivolous"

A claim is insubstantial only if "its unsoundness so clearly results from the previous decisions of [the Court] as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Ex Parte Poresky*, 290 U.S. 30, 32 (1933). Recent decisions of the Court, and indeed, of other panels in the second circuit as well, clearly establish that appellants' constitutional claims are not insubstantial.

In *Eisenstadt v. Baird*, *supra*; *Reed v. Reed*, *supra*; *James v. Strange*, 407 U.S. 128 (1972); and *United States Dept. of Agriculture v. Moreno*, *supra*, this Court scrutinized the challenged legislative classification to determine whether it was, *in fact*, substantially related to the objective of the statute. Focusing on the legislative means under attack, the Court, applying the rational means standard to test the equal protection challenge, measured the classification by applying the laws to

¹⁷New York Courts have consistently held that the provisions of N.Y. Social Services Law §350-j mandate emergency assistance to avoid destitution or to provide living arrangements for needy families with children. *See, Young v. Stuart*, 67 Misc. 2d 689 (Sup. Ct. 1971), *aff'd.* 39 A.D. 2d 724 (2d Dept. 1971). More importantly, the Social Security Act favors such assistance because it meets emergency needs without penalizing the child by reducing grants of assistance in subsequent months. *See, Social Security Act* §406(e), 42 U.S.C. §606(e), 45 C.F.R. §233.20.

factual context rather than accepting one hypothetical legislative justification to the exclusion of others that represented the true rationale of the classification. In *Reed v. Reed*, *supra* and *Eisenstadt v. Baird*, *supra*, the challenged statutes were held to be violative of the equal protection clause notwithstanding that the classifications had "minimal rationality" and "marginal relation" to a legitimate state interest.

In *Carter v. Stanton*, 405 U.S. 669 (1972), an Indiana welfare regulation was challenged as violative of the equal protection clause and Social Security Act. Because the lower court had dismissed the complaint on the grounds that the equal protection claim was insubstantial the question before the Court was similar to the case at hand. The Court, citing *Dandridge*, found the constitutional claim to be substantial, reversed the lower court's holding, and remanded the case for further proceedings.¹⁸

The principles of equal protection are "proteus-like" and "[i]n this day and time of dynamic expansion of constitutional principles and their application to new and sometimes unheard of situations it takes judicial prescience of a Delphic order to say with certainty that the attack is insubstantial."¹⁹ *Jackson v. Choate*, 404 F.2d 910, 913 (5th Cir. 1968). It is by far the better course—certainly from the standpoint of judicial

¹⁸In *Townsend v. Swank*, 404 U.S. 282 (1971) decided subsequent to *Dandridge*, the Court while declaring the Illinois welfare statute invalid on the statutory grounds in *dictum*, stated: "We think there is a serious question whether the Illinois classification can withstand the strictures of the Equal Protection Clause."

¹⁹See generally, Gunther, *The Supreme Court, 1971 Term Forward: In Search of Evolving Doctrine on a Changing Court: Model for a New Equal Protection*, 86 Harv. L. Rev. 1 (1972).

economy—as *Goosby* holds, to forego the doubts, obtain jurisdiction and dispose of the issues on the merits. The court below, seemingly disposed of the merits of the claims under the guise of determining the threshold question of jurisdiction.

The Second Circuit panel in *Boraas v. Belle Terre*, 476 F.2d 806, 814-15 (2d Cir. 1973), rejected the use of rigid “litmus-paper test” analysis to equal protection challenges.²⁰ That case decided by the circuit subsequent to the case now before the Court, declared a zoning ordinance to be violative of the equal protection clause, after determining that it was not in fact substantially related to the objectives asserted by the legislative body.

Measured by the standards enunciated by this Court in *Goosby v. Osser*, *supra*, it is clear that there are no prior decisions of the Court which “inescapably” render the claims frivolous and without merit.²¹ The court below erroneously concluded on the basis of the holding in *Dandridge v. Williams*, *supra*, that the claims were

²⁰ Other panels in the Second Circuit have also voiced doubt over rigid two-tiered approach to equal protection claims. *See, e.g., City of New York v. Richardson*, 473 F.2d 923, (2d Cir. 1973), where the court applied what it described as “a modified rational relationship” standard. *Cf. Aguayo v. Richardson*, 473 F.2d 1090 (2d Cir. 1970)

²¹ The second circuit has been troubled by the selection and application of the appropriate standards in determining whether constitutional claims are substantial. *See, e.g. Boraas v. Belle Terre*, 476 F.2d 824, 826 (2d Cir. 1973) (dissenting opinion, Timbers, denial *en banc* review); *Johnson v. New York State Education Dept.*, 449 F.2d 871, (2d Cir. 1971) *vacated and remanded*, 409 U.S. 75 (1972); *compare, Russo v. Kirby*, 453 F.2d 548 (2d Cir. 1971) with *Francis v. Davidson*, 340 F. Supp. 351, (D.Md. 1972), *aff'd*, 93 S. Ct. (1973); *Compare McCall v. Shapiro*, 292 F. Supp. 268 (D. Conn. 1969) with *Goldberg v. Kelly*, 297 U.S. 254 (1970).

insubstantial, for as we have demonstrated, here the classification fails to satisfy the standard of that case—"rationally based and free from invidious discrimination." Moreover, the court's reliance upon *Dandridge* as determinative of the due process claim presented by the complaint is even more unavailing, since that case is limited in scope to equal protection claims. While *Dandridge* might have afforded the court below reason to doubt the ultimate success of the equal protection claim, *Goosby* makes it abundantly clear that such doubt may not serve as the basis for determining that the claims are insubstantial.

As we have demonstrated the constitutional claims presented satisfy the *Goosby v. Osser* standard and are plainly substantial and sufficient to support federal jurisdiction. The conclusion by the court below to the contrary, is in conflict with the second circuit panel in *Hagans I*, and the courts in *Cooper v. Laupheimer*, *supra*, 316 F. Supp. 264; *Bradford v. Juras*, *supra*, 331 F. Supp. 167; *Holloway v. Parham*, *supra*, 340 F. Supp. 264, which found the constitutional claims herein presented to be of substance and the basis for invoking jurisdiction.

The district court having thus obtained jurisdiction under 28 U.S.C. § 1343(3) by reason of the presentation of substantial constitutional claims, properly accepted the pendent jurisdiction over the statutory claim. *King v. Smith*, *supra*. This Court has held that the exercise of pendent jurisdiction is particularly appropriate, inasmuch as the claim based on a violation of the Social Security Act raises questions which primarily involve federal policy and law. *Rosado v. Wyman*, *supra*, 397 U.S. at 404 (1970).

POINT II

**THE DISTRICT COURT HAD JURISDICTION
UNDER 28 U.S.C. §§1343(3) AND (4) TO DETER-
MINE THE FEDERAL STATUTORY CLAIMS**

Whether or not the Court below properly concluded that the complaint fails to raise a substantial constitutional (equal protection or due process) claim sufficient to maintain jurisdiction under 28 U.S.C. §1343(3), and pendent jurisdiction over the Social Security Act claims, the District Court nevertheless had independent jurisdiction to determine those latter claims under both 28 U.S.C. §§1343(3) and 1343(4). Appellants will demonstrate that their federal statutory claims were properly founded under the Civil Rights Act, 42 U.S.C. §1983, and that Congress intended that all §1983 claims may be brought in a federal district court without regard to amount in controversy under 28 U.S.C. §1343.

First, Appellants will argue that §1983 is an "Act of Congress providing for the protection of civil rights, including the right to vote" within the meaning of §1343(4). Second, that §1983 is an "Act of Congress providing for equal rights of citizens or of all persons with the jurisdiction of the United States" within the meaning of §1343(3). Under either section, therefore, the district court had jurisdiction over the instant case.²²

²²The district court agreed with the contentions advanced by appellants and HEW and held that the recoupment regulation contravened the Social Security Act §402(a)(7) and (10) as well as HEW regulation, 45 C.F.R. §233.20 (a)(3)(ii)(c) because the regulation assumes, without proof, that the emergency rent disbursement, expended in a prior month, remains available to meet needs during the subsequent period of recoupment. HEW's regulation has been upheld in *Lewis v. Martin*, 397 U.S. 552, 559 (1970), and the District Court's holding on the merits is consistent

A. Deprivations of Rights Established by Federal Statutes May Be Redressed Under §1983

Section 1983 provides as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities *secured by the Constitution and laws*, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (Emphasis added)

This court has traced the history and expansion of this statute, which is §1979 of the *Revised Statutes* and which was originally §1 of the Civil Rights Act of 1871, Act of April 20, 1871, ch. 22, 17 Stat. 13, in several recent cases. See, e.g., *Mitchum v. Foster*, 407 U.S. 225 (1972); *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972). Although the predecessor of §1983 was originally restricted by its language to the redress of "rights, privileges, or immunities secured by the Constitution," it was expanded by the Congress when the federal statutes were revised and codified in 1875, and it now includes within its terms rights, privileges, or immunities "secured by the Constitution and laws." (emphasis added). See *Mitchum v. Foster*, *supra* at 240 n.30; *Lynch v. Household Finance Corp.*, *supra* at 543 n.7, 548 n.15, 549, n.16; *Adickes v. S.H. Kress & Co.*,

with the decisions of other federal courts which have struck down similarly styled recoupment regulations. See, e.g., *Cooper v. Laupheimer*, 316 F. Supp. 264 [E.D. Pa. 1970]; *Bradford v. Juras*, 331 F. Supp. 167 [D. Ore. 1971]; cf. *Holloway v. Parham*, 340 F. Supp. 336 [N.D. Ga. 1972].

398 U.S. 144, 150 n.5 (1970);²³ *Greenwood v. Peacock*, 384 U.S. 808, 829-30 (1966); See also *Bomar v. Keyes*, 162 F.2d 136, 139 (2d Cir.), cert. denied, 332 U.S. 825 (1947). Cf. *United States v. Price*, 383 U.S. 787, 797 (1966); *United States v. Guest*, 383 U.S. 745, 753 (1966).²⁴

Appellants seek to redress in this lawsuit rights secured to them by federal "law", namely particular provisions of the Social Security Act and regulations promulgated thereunder. While they may not have any "right" in some absolute sense to a particular level of welfare benefits, or to any benefits at all, the Social Security Act has given them the right to receive AFDC benefits for which Congress has made them eligible, and computed according to the terms set forth by Congress, so long as the state continues to use federal funds for its AFDC

²³Congress continues to recognize the availability of §1983 to redress statutory deprivations. In *Adickes* the Court noted that §207(b) of Title II of the 1964 Civil Rights Act, 78 Stat. 243, 42 U.S.C. §2000a *et seq* provides that injunctive relief is the only available remedy for violation of that Title, and that this section was specifically inserted to prevent the use of §1983 to obtain damages for violations of the statute. *Id.* See 110 Cong. Rec. 9767.

²⁴The *Revised Statutes* are positive law and repeal and supercede all previous Statutes at Large. See Revision of Statutes Act of 1874, ch. 333, §21, 18 Stat. 113 (1875). Thus, the authoritative language is that of R.S. §1979, not that of the original 1871 enactment which did not specifically mention "laws". It is certainly arguable, moreover, that since one of the rights, privileges and immunities, secured by the Constitution is the right found in §1 of the Fourteenth Amendment which protects citizens against state abridgment of their privileges and immunities, the original 1871 Act already afforded a remedy against state deprivation of federal statutory rights. This is so since such rights were amongst the privileges and immunities guaranteed by the Fourteenth Amendment. See the *Slaughter House Cases*, 16 Wall. 36 (1872).

program. See, e.g., *King v. Smith*, 392 U.S. 309 (1968); *Rosado v. Wyman*, 397 U.S. 397 (1970); *Townsend v. Swank*, 404 U.S. 282 (1971). Indeed, in the AFDC cases just cited, the Court adjudicated various Social Security Act claims which were specifically brought pursuant to §1983.²⁵

B. 28 U.S.C. §1343(4) Provides Federal Jurisdiction for §1983 Claims

Section 1343(4) provides that the district courts shall have jurisdiction of any civil action "[t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." As this Court has often observed, the judicial construction of a statute properly begins "by looking to the text itself." *United States v. Bass*, 404 U.S. 336, 339 (1971). The text of §1343(4) leaves no room for dispute as to the district court's jurisdiction in this case, for the Social Security Act claims were brought under perhaps the most important of all the Acts which "protect" civil rights, §1983.

Initially, it is useful to remember that the term "civil rights" has *not* been used by Congress to refer narrowly only to the right to racial equality before the law. Thus, for example, §1983 applies to the whole gamut of federally protected rights. See, e.g., *Monroe v. Pape*, 365 U.S. 167, 180-83 (1961); *Baker v. Carr*, 369 U.S. 186, 200, and n.19 (1962); *Douglas v. City of Jeanette*, 319 U.S. 157, 161-2 (1943). This Court has too frequently

²⁵ Jurisdiction to decide the statutory claims in these cases was obtained because they were pendent to substantial constitutional claims. The statutory cause of action in each case, however, was alleged as arising under §1983.

reviewed the original "civil rights" statutes and described their fundamental purposes to require extended discussion here. Suffice to say that the initial Civil Rights Act, Act of April 9, 1866, ch. 31, 14 Stat. 27, "guaranteed 'broad and sweeping . . . protection' to basic civil rights", *Lynch v. Household Finance Corp.*, *supra*, 405 U.S. at 543-44, and that those "civil rights" included the "[a]cquisition, enjoyment, and alienation of property." *Id.* The 1871 Civil Rights Act, the predecessor of § 1983, was modeled after § 2 of the 1866 Act, *Id.* at 543, and it protected citizens from the deprivation of such civil rights at the hand of state officials.

While there is considerable support in the legislative history of these Acts for the view that the civil rights to be protected by the Congress included a broad range of "fundamental rights" possessed by all citizens [as articulated by Justice Washington in his famous opinion interpreting the privileges and immunities clause of Art. IV in *Corfield v. Coryell*, 6 F. Cas. 546 [No. 3230] see Antieau, *Modern Constitutional Law*, vol. 1, 703-715 (1969)], at the very least the various civil rights acts protected those rights appertaining to national citizenship, namely those granted by the federal government by its laws or through its constitution.²⁶ See, e.g., sources cited and quoted in *Mitchum v. Foster*, *supra* at 239 and notes 29, 30; *Monroe v. Pape*, *supra* at 170-71; and *id.* at 205 n. 3, 206 n. 4 (Frankfurter dissenting). See also *Slaughter House Cases*, *supra*.²⁷ Just

²⁶Thus, § 1983 enacted specifically to enforce the Fourteenth Amendment (and titled as such by the Congress), enforced § 1 of that Amendment, which forbids the states from abridging any of the "privileges, or immunities of citizens of the United States." See note 24, *supra*.

²⁷*Black's Law Dictionary*, 4th ed. (1968), p. 1487, for example, defines "civil rights" as "rights appertaining to a person in virtue of his citizenship in a state or community. Rights capable of being enforced or redressed in a civil action."

as the right not to be deprived of property without due process of law is a "civil right" secured by the Constitution, so then is the right to receive property in the form of AFDC benefits a "civil right" secured by the Social Security Act. *Cf. Goldberg v. Kelly*, 397 U.S. 254, 262 (1970); *Lynch v. Household Finance Corp.*, *supra* at 552.²⁸

Finally, it is beyond question that §1983 "protects" such civil rights. Indeed, that is its very function, and its *only* function. See *Mitchum v. Foster*, *supra* at 240-42.²⁹ It protects federal rights by providing civil remedies (equitable and damages) for their deprivation at the hands of state officials, and by providing a federal forum to enforce those rights which may be utilized without regard to the availability of parallel state remedies.³⁰ In fact, the Act upon which §1983 was

²⁸In *Lynch* the Court noted that "The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is, in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property." See, generally, Reich, *the New Property*, 73 *Yale Law J.* 733 (1964).

²⁹For example, the Court in *Mitchum*, (at p. 240) quoted from remarks of Rep. Lowe during the 1871 debates: "The Federal Government cannot serve a writ of mandamus upon State Executives or upon State courts to compel them to *protect* the rights, privileges and immunities of citizens. . . Hence this bill throws open the doors of the United States courts to those whose rights under the Constitution are denied or impaired." The Court noted (at p. 242) that "[t]he very purpose of §1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to *protect* the people from unconstitutional action under color of state law. . ."

³⁰*Preiser v. Rodriguez*, ___ U.S. ___, 93 S.Ct. 1827, 1830 (1973); *Monroe v. Pape*, *supra* at 183; *McNeese v. Board of Education*, 373 U.S. 668, 671 (1963); *Damico v. California*, 389 U.S. 416 (1967).

modeled, the 1866 Act, was itself explicitly entitled "An Act to protect all Persons in the United States in their Civil Rights, and furnish the means of their vindication" 14 Stat. 27.

The unambiguous applicability of §1343(4) to claims brought under §1983 was recently recognized by this Court. In *Moor v. County of Alameda*, ___ U.S. ___, 93 S.Ct. 1785 (1973), in rejecting a contention that 42 U.S.C. §1988 was an "Act of Congress providing for the protection of civil rights" within the purview of §1343(4), the Court contrasted §1988 with §1983 (and §§1981, 1982, 1985), and held that §1988 "is intended to complement the various acts [such as §1983] which do create federal causes of action for the violation of federal civil rights." *Id.* at 1972.³¹ Other courts, specifically addressing the issue presented herein, have given §1343(4) the meaning its words clearly convey. *See e.g.*, *Gomez v. Florida State Employment Service*, 417 F.2d 569, 580, n. 39 (5th Cir. 1969); *Hall v. Garson*, 430 F.2d 430, 438 (5th Cir. 1970); *Worrell v. Sterrett*, 1 CCH Pov. L. Rep. para. 1045.101 (D. Ind. 1970); *Stogner v. Page*, 1 CCH Pov. L. Rep. para. 553.901 (N.D. Ill. 1970); *Bass v. Rockefeller*, 331 F. Supp. 945, 949, n.5 (S.D.N.Y. 1971), *vacated as moot*, 464 F.2d 1300 (2d Cir. 1971).³² Only

³¹Section 1988 specifies additional remedies which may be used in cases in which "the provisions of this chapter [Civil Rights] and Title 18, for the protection of all persons in the United States in their civil rights" confer jurisdiction in the district courts (emphasis added).

³²This Court has twice assumed that §1983 is an "Act of Congress providing for the protection of civil rights" within §1343(4). In both *King v. Smith*, *supra*, 392 U.S. at 312 n.2, and *Rosado v. Wyman*, *supra*, 397 U.S. at 403, the Court specifically said that jurisdiction over the constitutional claims brought under §1983 in those cases rested on 1343(3) and (4). Section 1343(4),

the second circuit has rejected Appellants' interpretation of §1343(4), but even that court has not done so with any explanation of its reasoning.

Thus, the instant case was dismissed without discussion solely on the authority of *Almenares v. Wyman*, 453 F.2d 1075 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972). See *Hagans v. Wyman*, *supra*, 471 F.2d 349. *Almenares*, in turn, while finding jurisdiction because of the pleading of a substantial constitutional claim, in *dicta* rejected §1343(4) as a basis for jurisdiction, again without discussion, solely on the authority of *McCall v. Shapiro*, 416 F.2d 246 (2d Cir. 1969). See *Almenares v. Wyman*, *supra*, 453 F.2d 1082, n. 9. Finally, while *McCall* did discuss the applicability of §1343(4), it rejected it entirely on the basis of the personal liberties/property rights distinction which was later to be adopted by Judge Friendly in his *Eisen v. Eastman* decision [421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970)] and rejected by this Court in *Lynch v. Household Finance Corp.*, *supra*. See *McCall v. Shapiro*, *supra*, 416 F.2d at 250.³³

It is apparent, then, that the language of §1343(4) is so clear that a convincing rationale for rejecting its

however, provides jurisdiction only to claims under statutes of a certain sort. Unlike 1343(3), it makes no reference to constitutional rights. Consequently, as §1983 is the only statute conceivably relevant to the claims in *King* and *Rosado*, the Court must necessarily have decided that §1983 is an "Act of Congress providing for the protection of civil rights."

³³Curiously, Judge Friendly, the author of *Almenares* and a member of the panel below, specifically noted in *Eisen* that the holding therein did *not* apply to §1343(4) which "by its letter might be considerably more" than the technical provision certain legislative history would indicate. *Eisen v. Eastman*, *supra*, 421 F.2d at 562, n.2.

application to §1983 suits has not been found. The only roadblock to jurisdiction under this section which is apparent to Appellants is a brief description of the provision in the House report accompanying the bill in which it was included.³⁴ The report describes the proposed amendments to §1343 adding subsection (4) as

“merely technical amendments to the Judicial Code so as to conform it with amendments made to existing law by the preceeding section of the bill. The first part of the proposal amends the catch line of a section, and the other section adds a new paragraph setting forth the jurisdiction of the court.” U.S. Code Cong. Adm. News, H. Rep. 291, 85 Cong., 1st Sess. 1966, 1976 (1957).

Appellants will demonstrate that this somewhat limited view of §1343(4) is completely out of line with the statutory language used by the Committee and with the legislative history of the eventual enactment of §1343(4), and therefore it should be given no weight by the Court in assessing the true meaning of the provision. Indeed, the absence of any guidance whatsoever for the Court’s task inherent in the Committee’s description counsels in favor of a construction which is in accord with the plain words chosen.

First, the “preceding section” of the bill (§121) to which the House report refers was *not* enacted.³⁵ That provision, which authorized the Attorney General to bring civil actions in order to obtain injunctive relief against violations of 42 U.S.C. §1985, was the major bone of contention during the Congressional debates, *see*, generally, Schwartz, *Statutory History of the United*

³⁴H.R. 6127 was enacted as the Civil Rights Act of 1957, 71 Stat. 634, P.L. 85-315.

³⁵§1343(4) was originally proposed as §122 of H.R. 6127 and, with §121, appeared in Part III of the bill.

States: Civil Rights, volume 2 (1970) at page 838 and was eliminated by floor amendment prior to Senate passage of the bill, 103 Cong. Rec. 12564-65 (1957). Unless this Court were to assume, contrary to general practice, that Congress enacted §1343(4) without any purpose in mind, to serve no function, *cf. Uptagrafft v. United States*, 315 F.2d 200, 204 (4th Cir.), *cert. denied*, 375 U.S. 818 (1963), the provision must have been intended by the Congress to accomplish something more than the House committee thought was its role. *See General Motors Acceptance Corp. v. Wishant*, 387 F.2d 774, 778 (5th Cir. 1968); *Platt v. Union Pac. R.R. Co.*, 99 U.S. 48, 58 (1878).

Indeed, even had the preceding section, §121, been enacted, the House Report's description would not have been reliable. Thus, the very words chosen by the Congress clearly go beyond the ascribed purpose, applying to "any Act of Congress" protecting civil rights, not limited to §1985 as are the other provisions of §1343 establishing jurisdiction over §1985 actions brought by private individuals. *See* 28 U.S.C. §1343(1) and §1343(2). Congress surely knew how to use the necessary language to accomplish such a narrow purpose. *Cf. Addison v. Holly Hill*, 322 U.S. 607, 618 (1944). Moreover, if §1343(4) were truly intended to provide only for jurisdiction over the proposed Attorney General actions under §1985, it would have been a totally unnecessary piece of legislation. The district courts were already authorized by 28 U.S.C. §1345³⁶ to hear such

³⁶28 U.S.C. §1345 provides as follows:

"Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

suits brought by the Attorney General and, moreover, §121, quite apart from §1343(4), included a specific addition to §1985 authorizing suits by the Attorney General to be commenced in the district courts.³⁷

Nor could the House report be construed to apply to the only other substantive right which was proposed by H.R. 6127, and which was enacted by Congress, namely the amendment to 42 U.S.C. §1971 to prohibit intimidation and coercion which interferes with the right to vote. P.L. 85-315, §131(c), 71 Stat. 637. Section 1343(4) quite unequivocally applies to statutes which protect "civil rights, *including* the right to vote," (emphasis added), *not* just to voting rights. Moreover, as with §121, the new substantive right proposed and enacted by §131 includes a specific grant of district court jurisdiction. See 42 U.S.C. §1971(d).

Furthermore, whatever the House Committee may have thought the purpose of §1343(4) to be, there is convincing evidence that the Congress attributed some significance to it. Thus, after House passage, H.R. 6127 was sent to the Senate floor directly in order to bypass the Senate Judiciary Committee. 103 Cong. Rec. 9777 (1957). As noted earlier, significant opposition mounted against Part III of the bill and, on July 16, 1957 an amendment was proposed by Senators Aiken and Ander-

Since §121 included such an authorization by adding a subparagraph (4) to §1985, §1345 would have afforded jurisdiction.

³⁷Section 121 also proposed to add a new subparagraph (5) to §1985 which read as follows:

"The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law." H. Rep. no. 291, 85th Cong., 1st Sess. (1957) 22.

son to strike Part III in its entirety. 103 Cong. Rec. 11838 (1957). At the same time, additional opposition to the bill was voiced by senators who feared that the bill would be the occasion for the reactivation and use of Rev. Stats. §1989, 42 U.S.C. §1993, one of the original civil rights acts which authorized the President to use land or naval forces to enforce judicial process or prevent violation of other civil rights statutes.³⁸ Senators Knowland and Humphrey introduced an amendment to repeal §1993 in order to assuage the fears expressed by Senator Thurmond and others, and thus enhance chances for passage of the bill. 103 Cong. Rec. 12304 (1957).³⁹

On July 22, 1957, Senators Aiken and Anderson, in response to an amendment offered by Senator Case, modified their prior amendment to strike Part III in its entirety so as to strike only §121, thus leaving intact §122, the provision which added §1343(4). 103 Cong. Rec. 12284 (1957). When Senator Humphrey asked for an explanation of this modification, Senator Aiken replied:

"The effect of the modification of the amendment . . . will be to permit members of the Senate to vote for the Knowland-Humphrey amendment, and

³⁸The southern senators feared that the military force provision of §1993 would be used to enforce §121. Senator Thurmond predicted that "(b)y a cross-reference device part III of H.R. 6127, if enacted into law, would be incorporated into one of the sections of the United States code which may be enforced by §1993 [§1993] has lain dormant for many years, but today some of the proponents of H.R. 6127 still seek to breathe new life into it. They would do this by part III of H.R. 6127, so that troops could be used to integrate southern schools." 103 Cong. Rec. 12299 (1957).

³⁹Senator Javits, on the other hand, believed §1993 was not a serious problem, but rather a "straw man" thrown up to block passage of the bill. 103 Cong. Rec. 12307 (1957).

then to vote to strike the objectional [sic] portion of part III without embarrassment.

"As a matter of fact, there should now be no objection by anyone to approving the Knowland-Humphrey amendment." *Id.*⁴⁰

While this explanation falls far short of identifying the purpose of §1343(4) with precision, it does illustrate that the sponsors of the amendment believed that its retention in H.R. 6127 offered something of substance to attract senators to the support of the Knowland-Humphrey amendment. The Knowland-Humphrey amendment was passed on July 22, 1957 after the Aiken modification was made, 103 Cong. Rec. 12314, and the Aiken-Anderson amendment, as modified, passed two days later. 103 Cong. Rec. 12564-66.

One hypothesis that is certainly tenable is that senators supportive of strong civil rights enforcement may have been convinced to support the repeal of a military enforcement provision in exchange for a judicial enforcement provision which would guarantee federal court jurisdiction over all federal civil rights controversies. In any case, it is difficult to imagine, indeed frivolous to suggest, that §1343(4), which the Senate carefully retained, was accepted by the Senate as a "technical amendment" to conform to a provision it had knowingly rejected. As the late Mr. Justice Harlan described another federal statute,

⁴⁰Senator Case then described §122 as dealing "wholly with the establishment of jurisdiction for Federal courts to entertain suits relating to the right to vote." *Ibid.* Senator Case obviously was making reference to that section's immediate applicability to the amendments to 42 U.S.C. §1971 made by §131 of the bill. Given the language used by the Congress, "civil rights, *including* the right to vote" (emphasis added), it is impossible to read the provision as being *restricted* to the right to vote.

"we have before us a child born of the silent union of legislative compromise. Thus, Congress, as it frequently does, has voiced its wishes in muted strains and left it to the courts to discern the theme in the cacophony of political understanding. Our chief resources in this undertaking are the words of the statute and those common sense assumptions that must be made in determining direction without a compass." *Rosado v. Wyman*, *supra* at 412.

The words of §1343(4) and the common sense assumption that the Senate hardly took special pains to retain §1343(4) sheerly as an exercise, argue for petitioner's suggested interpretation.

Specific legislative support for an interpretation of §1343(4) which would breathe life into the section and leave it more than a useless appendage is available. Thus, shortly after final passage of H.R. 6127 on August 27th in the House, and on August 29th in the Senate, 103 Cong. Rec. 16112, 16478 (1957), (with the Senate's version of Part III accepted), the Senate majority leader, Lyndon Johnson, submitted at the end of the legislative session a summary of the year's work to the Congress. With regard to the provision in question the summary declared that it

"[e]xtends the jurisdiction of the district court to include any civil action begun to recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights, including the right to vote." 103 Cong. Rec. 16620 (1957) (emphasis added).

This is at least some legislative recognition that §1343(4) added something of value to the Judicial Code by

extending federal judicial power.⁴¹ Some further evidence of the purpose of §1343(4) may be gleaned from the title of Part III of P. L. 85-315 in which it was included (as §121), "To strengthen the Civil Rights Statutes, and for Other Purposes." While that title was also used for Part III in the original bill when it included the provision for Attorney General enforcement of 42 U.S.C. §1985, the fact remains that as enacted, Part III included *only* two sections, §121, which added §1343(4), and §122, which repealed 42 U.S.C. §1993. Surely only §121 *strengthened* civil rights statutes, and then, only if given the interpretation sought by Appellants.

Finally, the general thrust of the 1957 Civil Rights Act is relevant to determining the meaning to be given to one of its sections. See, Frankfurter, *Some Reflections on the Reading of Statutes*, 47 *Colum. L. Rev.* 527, 538-39 (1947). Apart from the one voting provision in Part IV, 71 Stat. 637, the Act was entirely a procedural one, establishing a Commission on Civil Rights, Part I, 71 Stat. 634, an additional Assistant Attorney General to concentrate on civil rights enforcement, Part II, 71 Stat. 637, and specific enforcement authority in the voting area for the Attorney General, Part IV, 71 Stat. 637. As the House Report indicates, "[t]he provisions of the bill, H.R. 6127, are designed to achieve a more effective enforcement of the rights [already] guaranteed by the Constitution and laws of the United States." U.S. Code Cong. & Adm. News 14 Rep. 29, 85th Cong. 1st Sess. 1966, 1970 (1957). Our interpretation of §1343(4),

⁴¹Senator Johnson's description is not unimportant since, contrary to usual practice, there was no conference on the bill, and Johnson met with the Speaker of the House and minority leader to resolve differences between the bodies. See 103 Cong. Rec. 16203 (1957).

designed to enhance civil rights enforcement by enlarging federal court jurisdiction, is entirely supportive of the purpose of the legislation.

The Court is not construing §1343(4) on a clean slate. In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), a suit brought under 42 U.S.C. §1982 against a private corporation which was charged with refusing to sell petitioner a home solely because he was a Negro, the Court held that the district court had jurisdiction to hear the case without regard to the amount in controversy under §1343(4) *Id.* at 412, n. 2. The specific issue resolved in *Jones* was whether §1982 was intended to bar "all racial discrimination, private as well as public, in the sale or rental of property," and if so, whether Congress could constitutionally so provide. *Id.* at 413. In answering these questions in the affirmative, the Court's acceptance of jurisdiction under §1343(4) became significant. No other statute is presently in force which will provide federal jurisdiction over *private* civil rights violations under §1982 (or §1981). 28 U.S.C. §1343(3) is *not* available for this purpose since it expressly serves to provide jurisdiction to redress deprivations only "under color of any state law."

If §1343(4) is too "technical" a provision to provide jurisdiction in §1983 suits, surely it should have been too "technical" to service §1982. The short answer is that Congress intends that *all* civil rights cases be brought in the federal courts, and §1343(4) serves as a ready and logical vehicle to accomplish that purpose.⁴²

⁴²The Court has also accepted §1343(4) jurisdiction in private cases brought to enforce §5 of the 1965 Voting Rights Act. See *Allen v. Board of Elections*, 393 U.S. 544, 554 (1969). While *Allen* clearly involved a statute "protecting the right to vote", the case is further demonstration that §1343(4) does have utility and is not merely "technical" and related to a proposal not enacted.

C. 28 U.S.C. §1343(3) Provides Federal Jurisdiction for All §1983 Claims.

The district court also properly exercised jurisdiction under 28 U.S.C. §1343(3) independently of the presence of Appellants' constitutional claims. Although the Court has never passed on the issue, see *King v. Smith*, *supra* at 312 n. 3; *Rosado v. Wyman*, *supra* at 405 n. 7, the history of §1343(3) and §1983 reveals beyond serious question that Congress did not intend to create a hiatus between the cause of action created by §1983 and the jurisdiction of the federal courts.⁴³

The 1871 Civil Rights Act (the predecessor of §1983) had specifically provided that *any* substantive action thereby created could be brought in either the federal district courts or federal circuit courts in the same manner as provided under the Civil Rights Act of 1866,⁴⁴ which in turn gave both federal courts jurisdiction for *all* actions created thereunder. Civil Rights Act of 1871, ch. 22, §1, 17 Stat. 13. Thus there was at the start a rather clear intent to establish a right to bring any authorized civil rights action against state officials in federal court. In 1875, however, as part of the full scale revision of all federal statutes, the substantive provisions of §1 of the 1871 Act became Rev. Stats. §1979, and the jurisdictional provisions of the Act were codified in two separate provisions. As noted earlier, and as frequently recognized by the Court, Rev. Stats. §1971 (now §1983) enlarged the substantive reach of the 1871 Act by

⁴³Thus, for example, in *Bomar v. Keyes*, *supra*, Judge Learned Hand simply assumed (or thought the point so obvious as to require no discussion), that §1343(3) provided a jurisdictional basis for any §1983 suit.

⁴⁴Act of April 9, 1866, ch. 31, §3, 14 Stat. 27.

including federal "laws" as subject to its remedy. Consistent with the original scheme in 1871, however, federal jurisdiction was maintained for all §1983 cases.

Thus, Rev. Stats. 563(12) authorized district court jurisdiction:

"Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, ordinance, regulation, custom or usage of any state, of any right, privilege, or immunity secured by the Constitution of the United States, or by any right secured by any law of the United States to persons within the jurisdiction thereof." (emphasis added).

At the same time, Rev. Stats. §629(16) authorized circuit court jurisdiction in identical terms for constitutional claims, but instead of the broad "any law of the United States" language of §563(12), §629(16) went on to include jurisdiction for suits to redress rights under "any law providing for equal rights." Had §563(12) been the model for the current §1343(3) there would be no question regarding jurisdiction over statutory-based §1983 actions. Unfortunately, however, it was §629(16) with its arguably narrower "equal rights" reference that was used by the revisers of the Judicial Code in 1910. Act of March 3, 1911, ch. 231, 36 Stat. 1087. Petitioners submit that considerations of statutory language, legislative purpose and policy in both 1875 and 1911 suggest that the Congress did not intend to limit the availability of a federal forum in any §1983 cases.

First, recognizing that the original 1871 Act gave concurrent jurisdiction to the district and

circuit courts, one would expect some mention or discussion by the revisers as to any decision to limit circuit court power, if that was indeed their intention. Yet there is none, whereas the marginal notes to both §563(12) and 629(16) contain identical description of the provisions as pertaining simply to "suits to redress deprivation of rights secured by the Constitution and laws", and both provisions were cross-referenced to §§1977 and 1979 of the Revised Statutes (now 42 U.S.C. §1981 and 1983).⁴⁵ Appellants submit that §629(16) was intended to have the same breadth as §563(12), and given the unimpeachable clarity of the latter section ("any law of the United States"), to be coextensive with §1983.

The 1910 revision and consolidation again offers no specific explanation for the choice of the "equal rights" language. The scant legislative history supports the conclusion that Congress intended to provide jurisdiction for all actions authorized by §1983. The Senate Report explained its proposed §24(14) of the Judicial Code (later transferred to Title 28, §1343(3)) as follows:

"This paragraph merges the jurisdiction now vested in the district courts by paragraph 12 of section 563, and in the circuit courts by paragraph 16 of section 629, and vests it in the district courts." S. Rep. No. 388, 61st Cong., 2nd Sess. pt. 1 at 15 (1910).

Section 1983 jurisdiction was not "limited", or "narrowed", but "merged" and "vested" in the district

⁴⁵ Moreover, Rev. Stats. §1979) (§1983) was cross-referenced to both jurisdictional provisions without exception or limitation.

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courts. Again, given the clarity of §563(12) and failure to explain the purported limitation we can only conclude that none was intended and that *all* §1983 claims were continued to be authorized in the federal courts without regard to amount in controversy.⁴⁶

Thus, throughout the long history of these statutes every indication is that the scope of the jurisdictional statute is as great as its substantive counterpart. That the change of 1910 took place amidst a general revision of the judicial code suggests even more strongly that Congress did not intend to change the jurisdictional framework to create a gap between the substantive action and jurisdiction to hear it. Any such result would be

⁴⁶Original federal question jurisdiction was given the federal courts in 1875, Act of March 3, 1875, 18 Stat. 470, the same year in which the predecessor of §1983 was enlarged to include state deprivations of federal statutory rights. In *Lynch v. Household Finance Corp.*, *supra*, the Court found no indication in the legislative history that the provision of general federal question jurisdiction was intended to narrow the scope of the 1871 Civil Rights Act, particularly noting the simultaneous expansion of §1983. 405 U.S. at 548 and n.15. The Court further noted that when Congress increased the amount in controversy requirement in 1911 (to \$3000), 36 Stat. 1091, "there was no indication that jurisdiction under what is now §1343(3) was to be reduced," and indeed Congress had "explicitly preserved the exemption" for §1343(3)'s predecessor. *Id.* See also S. Rep. No. 388, pt. 1, 61st Cong., 2nd Sess. 11 (1910). But that 1911 Act was the very same statute which merged the district court and circuit court jurisdiction for §1983 civil right cases. Since until that enactment the district courts expressly had jurisdiction under §563(12) for suits seeking redress for *all* federal statutory deprivations by state officials, without regard to amount in controversy, it would be surprising at the very least for Congress to have so obliquely reversed its course in light of its expressed intention not to subject federal jurisdiction elsewhere provided to the jurisdictional amount requirement.

anomalous indeed. A specific federal remedy for equitable and legal relief is created, part of which cannot be enforced in a federal court.⁴⁷ Appellants do not believe such an anomalous consequence is compelled. Section 1983 is itself a statute providing "equal rights", and hence §1343(3) does not create a gap between itself and §1983.

The 1871 Civil Rights Act was, after all, "An Act to enforce the Provisions of the Fourteenth Amendment" as major an "equal rights" document as can be imagined. The Act grew out of President Grant's message to Congress on March 23, 1871 which noted the absence of effective law enforcement in many states and recommended

"Such legislation as in the judgment of Congress shall effectively secure life, liberty, and property, and the enforcement of law in all parts of the United States..." Cong. Globe, 42nd Cong., 1st Sess., p. 244.

In the debates on the 1871 Act, unmistakable concern was demonstrated over the activities of the Ku Klux Klan and the nonfeasance of state government authorities in failing to enforce the federal rights guaranteed to the newly emancipated Negroes by the Fourteenth Amendment. See generally, *Monroe v. Pape*, *supra* at 172-180. As the Court in *Monroe* observed, "[i]t was not the unavailability of state remedies but the failure of certain states to enforce the laws with an equal hand that furnished the powerful momentum behind this 'force bill.'" *Id.* at 174, 176. It was the "lack of enforcement"

⁴⁷See section D, *infra* for a discussion of the major equitable considerations arguing in favor of a construction of §1343 which would parallel §1983.

of state law to protect American citizens "that was the nub of the difficulty." *Id.* at 176.

Senator Pratt's remarks, quoted in *Monroe* (at p. 178) demonstrate the function of §1983 as an "equal rights" measure. Speaking of discrimination against Union sympathizers and Negroes in state law enforcement, he said:

"Plausibly and sophistically it is said the laws of North Carolina do not discriminate against them; that the provisions in favor of rights and liberties are general; that the courts are open to all; that juries, grand and petit, are commanded to hear and redress without distinction as to color, race, or political sentiment.

But it is a fact, asserted in the report, that of the hundreds of outrages committed upon loyal people through the agency of this Ku Klux organization not one has been punished. This defect in the administration of the laws does not extend to other cases. Vigorously enough are the laws enforced against Union people. They fail in efficiency when a man of known Union sentiments, white or black, invokes their aid. Then Justice closes the door of her temples." Cong. Globe, 42nd Cong., 1st Sess. 505.

Representative Hoar further stated that "[t]he principle danger that menaces us today is from the effort within the States to deprive considerable numbers of persons of the Civil and equal rights which the General Government is endeavoring to secure to them." Cong. Globe, 42nd Cong., 1st Sess. App. 335. As the Court recently observed, the post-Civil War enactments, particularly §1983, clearly established "the role of the Federal Government as a guarantor of basic federal rights against state power." *Mitchum v. Foster*, *supra* at 239. Section 1983, by providing a federal remedy and federal

forum secured for those unable to obtain it from the state courts, equal treatment before the law.

That §1983 goes further than guaranteeing racial equality before the law is, in light of this history, not at all inconsistent with its role as a guarantor of "equal rights". Having observed the lawlessness of state officials, and the inability of one class of citizens to enforce federal rights, Congress was persuaded to give sweeping protection to *all* persons whose federal rights are denied, *see, District of Columbia v. Carter*, 409 U.S. 418, 426 (1973); *Monroe v. Pape*, *supra* at 175-76, and to do so without regard in a particular case as to whether the state would or would not enforce the federal right, *see, e.g., Preiser v. Rodriguez*, *supra*. Section 1983 therefore, is a law "that confer[s] equal rights in the sense, vital to our way of life, of bestowing them upon all." *Georgia v. Rachel*, 384 U.S. 780, 792 (1966).

Appellee-State, in its brief in opposition to certiorari (at 14), relies on the Court's decision in *Georgia v. Rachel*, *supra*, as dispositive against our interpretation of the phrase "Act of Congress providing for equal rights." That case involved the interpretation of a similar phrase, "law providing for equal civil rights," used in 28 U.S.C. §1443(1), the civil rights removal provision. Tracing the original removal provision back to §3 of the 1866 Civil Rights Act, 14 Stat. 27, which provided for removal only in cases involving the express statutory rights of racial equality guaranteed in §1 of that Act itself, *Georgia v. Rachel*, *supra* at 790, the Court held that use of the term "equal civil rights" by the 1874 revisers was intended "to mean any law providing for specific civil rights stated in terms of racial equality." *Id.* at 792. So construed, the Court held that the due process clause of the Fourteenth Amendment, the First Amendment, and §1983, are not included within its terms. *Id.*

While the construction of §1443(1) in *Rachel* is relevant, it is certainly not determinative of the issue in this case. As the Court noted in *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932):

"Most words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section. Undoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning . . . But the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent. Where the subject matter to which the words refer is not the same in the several places where they are used, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed and the circumstances under which the language was employed."

The Court has not hesitated to apply these sound principles to the task of construction of the various civil rights statutes. Thus, in *Monroe v. Pape, supra*, although the Court had previously construed the phrase "any right or privilege secured . . . by the Constitution or laws" in 18 U.S.C. §241 to comprehend only rights arising from the relationship of the individual to the federal government, see *United States v. Williams*, 341 U.S. 70 (1951) it construed the related phrase in §1983 to comprehend all Fourteenth Amendment rights. *Monroe v. Pape, supra*

at 170; and 205-08 (Frankfurter, dissenting). Similarly, in *District of Columbia v. Carter*, *supra* at 420-421, the Court construed the phrase "State or Territory" as used in §1983 as excluding the District of Columbia despite *Hurd v. Hodges*, 334 U.S. 24 (1948) having previously construed the same phrase in §1982 as including the District. See 409 U.S. at 420-421. In both *Monroe* and *Carter*, the Court looked to the historical origins of the currently effective provisions, the purposes such original measures were intended to accomplish, and the different constitutional sources of power upon which they were based, in order to reach its conclusions. Such an analysis of §1443(1) and §1343(3) compels the conclusion that "Acts of Congress providing for equal rights" in §1343(3) was not intended to restrict that section to racial equality statutes.

Section 1443(1), as noted, was derived from the 1866 Civil Rights Act. There can be no doubt that the entire 1866 Act focused on racial inequality. That Act sought to implement the Thirteenth Amendment. The 1866 Act was Congress' initial attempt to eradicate some of the "badges of slavery" which it had been able to identify. See, e.g., *Jones v. Alfred H. Mayer Co.*, *supra*, 392 U.S. at 439-40. Criminal punishment meted out on the basis of race was probably as pernicious a badge of slavery as can be imagined. In sharp contrast, however, §1343(3), (along with §1983), originated with the 1871 Act, was an enforcement of the Fourteenth Amendment, and was specifically designed, as was the Amendment itself, to reach deprivations of federal rights beyond those cast in racial terms.

Also critical to determining Congressional intent in this regard is the role played by §1443(1) in the civil rights enforcement scheme. It is a removal provision, applicable

to civil suits *and* criminal prosecutions, *cf. Monroe v. Pape, supra* at 206 (Frankfurter concurring) and by its very nature is designed not only to oust state courts of their power to act in a particular case, *cf. Mitchum v. Foster, supra*, but to decide the case as well. A greater source of friction between federal and state sovereignties is difficult to imagine.

Indeed, recognizing the implications of removal, in the companion case to *Rachel* the Court gave to the phrase in §1443, "denied or cannot enforce in the courts of such State a right under [an equal rights law]" a very narrow interpretation which left to the state courts

"the vindication of the defendant's federal rights . . . except in the rare situations where it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in state court." *City of Greenwood v. Peacock*, 384 U.S. 808, 828 (1966).⁴⁸

In contrast to removal, the civil remedy authorized by the 1871 Act, one which is supplementary to any state remedy for redress of civil rights deprivations, *see McNeese v. Board of Education, supra; Monroe v. Pape, supra*, is far less drastic. Indeed, the availability of a civil §1983 remedy was itself persuasive to the court in *Greenwood* that its interpretation of §1443 was not destructive of federal rights. "[U]nder . . . §1983 . . . officers may be made to respond in damages not only for violations of rights conferred by federal equal civil right laws, but *for violations of other federal*

⁴⁸The Court's limiting construction of §1443 was also influenced by the likely impact a liberal interpretation would have on the work of the federal court. *Id.* at 832. No such overburdening effect will be the result of a generous interpretation of §1343.

constitutional and statutory rights as well." *Id.* at 829-30. [Emphasis added].

In sum, despite the "potential breadth" the Court in *Rachel* saw in the term "equal rights", it had sound historical and practical reasons for giving it less than its broadest meaning in the context of §1443. The considerations under §1343 compel a different result.

D. Practical and Policy Considerations Support the Conclusion That §1343 Was Intended To Provide Federal Jurisdiction for All §1983 Suits.

The most compelling consideration for interpreting §1343 so as not to leave a gap between it and §1983 is that the primary, if not exclusive, purpose of §1983 was to provide a federal judicial remedy for state inspired transgressions of federally created or guaranteed rights. As noted above, §1 of the 1871 Act specifically provided for federal court jurisdiction in all cases thereunder. As summarized by the court just last term:

"Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Mitchum v. Foster, supra* at 239.⁴⁹

The need for the intervention of the federal judiciary was manifest. As Justice Frankfurter observed in *Monroe v. Pape, supra* at 252, "a powerful impulse behind the creation of this 'substantive' right was the

⁴⁹See also *Mitchum* at 240, citing to the debates on the Act. Representative Lowe, for example, specifically noted that "this bill throws open the doors of the United States courts. . . ."

purpose that it be available, in, and be shaped through, original federal tribunals." As the *Monroe* majority concluded:

"One reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." 365 U.S. at 180.

Of course, in construing Congressional intent 100 years ago, the continued validity of its assumptions is not relevant. On the other hand, while state courts may not be guilty of the gross disregard of federal rights as was demonstrated to be the case in some states in 1871, there are nonetheless many important reasons applicable today for permitting plaintiffs to use a federal forum to redress their federally created rights, some of them rather similar to the considerations of the prior century. Welfare cases are a good example. In the wake of the recent hardening of attitudes toward welfare on the part of state legislatures and elected officials with widespread adverse publicity of welfare abuses, state courts are likely to be subject to subtle, hard-to-prove prejudice and political pressures that in practice deprive recipients of an adequate state forum. See, e.g., Reagan, *Welfare is a Cancer*, *New York Times*, April 1, 1971, at 41, col. 3-5.⁵⁰

⁵⁰It is the very potential of such prejudice that §1983 was directed. While racial prejudice may be a factor in the administration of state welfare programs, Cf. *Jefferson v. Hackney*, 406 U.S. 535 (1972), today another prejudice against recipients exists, one directed against supposed "social freeloaders". In *New York Department of Social Services v. Dublino*, 93 S.Ct. 2507, 2522 (1973), Mr. Justice Marshall, dissenting, wrote: "It is widely yet

Apart from the potential hostility to federal welfare claims, it cannot be denied that federal statutory rights are often created by complex statutes which require some degree of familiarity to understand and apply. The Social Security Act is a perfect example. Federal judges are appropriate to that task, especially if, as it is, securing uniformity of construction is an important requirement. Moreover, in a case such as this with a federal cabinet agency maintaining an interest in the disposition,⁵¹ a federal forum will undoubtedly facilitate its participation so that its views can be made known. See *Rosado v. Wyman*, *supra*, 397 U.S. at 407.⁵² Indeed, the federal courts have a special role to play in welfare cases, namely to insure that federal funds allocated by Congress are used as Congress has directed. See *Rosado v. Wyman*, *supra* at 420-22. As in *Rosado*, the appropriate remedial order in some cases may actually be a cut-off of

erroneously believed, for example, that recipients of public assistance have little desire to become self-supporting. See, e.g., L. Goodwin, *Do the Poor Want to Work?* 5.51-52, 112 (1972). Because the recipients of public assistance generally lack substantial political influence, state legislators may find it expedient to accede to pressures generated by misconceptions."

⁵¹HEW's interest, of course, would have been of little use to plaintiffs had they not commenced suit. Thus, despite a determination that New York's policy is illegal under federal law, the agency has taken no steps whatsoever to exercise its administrative powers under 42 U.S.C. §604. Recipients still do not have the right to "trigger" such HEW enforcement; see *Rosado v. Wyman*, *supra* at 406, which if taken would ultimately give the federal courts power to review the controversy as Congress intends anyway. See 42 U.S.C. §1316; 5 U.S.C. §701 *et seq.*

⁵²In welfare cases, when HEW submits an *amicus* brief it does so through the United States Attorney for the district. Not infrequently state agencies seek to join HEW in welfare litigation, also facilitated by a federal forum.

federal funds [although in this case such a remedy was unnecessary; see, e.g., *King v. Smith supra*; *Townsend v. Swank, supra*], one that only a federal court should order.

An adverse ruling to petitioners may not simply mean that state judicial relief will have to be pursued as an alternative remedy. Some states have filing fee requirements which will preclude recipients from bringing such an action. See *Ortwein v. Schwab*, ____ U.S. ____, 93 S.Ct. 1123, 1172 (1973). Cf. 28 U.S.C. §1915. Moreover, an important feature of §1983 is the authorization for equitable relief which may not have been available in the courts of all the states when §1983 was enacted, cf. *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 404 (1972) [Harlan concurring], and which may still not be available to the same extent as in federal court. A holding that some §1983 cases may not be brought in federal court may thus mean that adequate relief will not be available at all since the states are obligated to enforce federal law only insofar as their courts have jurisdiction over such suits. See, e.g., *Testa v. Katt*, 330 U.S. 386 (1947).

Finally, an interpretation of §1343 as providing jurisdiction for all §1983 suits would not result in a flood of federal court litigation. Many federal statutes have specific remedial provisions which must be complied with in order to effectuate the substantive right. Presumably such provisions would be interpreted to bar §1983 suits thereunder; see *Schatte v. International Alliance of Theatrical Stage Employees*, 182 F.2d 158 (9th Cir. 1950), or at least Congress could so provide, cf. *United States v. Johnson*, 390 U.S. 563 (1968); *Preiser v. Rodriguez, supra*.

Second, only those federal statutory claims which arise from a deprivation "under color of state law" will be actionable under §1983. Other federal statutory claims will still be subject to the general federal question jurisdiction provision, 28 U.S.C. 1331, or the multitude of special jurisdictional provisions, *e.g.*, 28 U.S.C. 1337.⁵³ In a case such as this, with the proper administration of millions of dollars of federal funds by state officials ultimately at issue,⁵⁴ it makes little sense to apply the jurisdictional amount requirement. While each member of plaintiffs' class asserts a claim for only a few hundred dollars, the case is not the "petty controversy" Congress seeks to keep from the federal courts by imposing a jurisdictional amount requirement. *See* S. Rep. No. 1830, 85th Cong., 2d Sess. at 3-4 (1958).⁵⁵

⁵³Indeed, this may well be the only class of federal question cases involving an important regulatory program subject to §1331. Congress surely did not intend such a result.

⁵⁴New York receives all of its AFDC funds only in return for a pledge to obey all categorical grant requirements such as §§402(a)(7) and (10).

⁵⁵This is not to say §1331 will never be available to welfare recipients. Often their claim may be "common and undivided" permitting aggregation; see, *e.g.*, *Bass v. Rockefeller*, *supra* or the dispute may involve the right to future benefits which exceed \$10,000; see, *e.g.*, *Aetna Casualty Co. v. Flowers*, 330 U.S. 464 (1947).

CONCLUSION

The Court should hold that the complaint herein presents substantial federal questions and the district court had jurisdiction of this case pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343. The judgment of the court below should be reversed, and the case remanded to that court for further proceedings.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CYNTHIA HAGENS, <i>et al.</i> ,	:	
<i>Plaintiffs,</i>	:	
-against-	:	Civil Action No.
	:	72-C-182
GEORGE K. WYMAN, <i>et al.</i> ,	:	
<i>Defendants.</i>	:	

BRIEF OF THE UNITED STATES
AS *AMICUS CURIAE*

This brief is submitted in response to the Court's invitation to the Department of Health, Education, and Welfare on July 19, 1972 to participate in this action as *amicus curiae*.

Plaintiffs have challenged the validity of a New York State welfare regulation which permits the state to advance certain welfare payments to families which are in danger of eviction from their homes because of non-payment of rent and requires the state to recoup these advanced sums by reducing the amount of the families' welfare checks over the succeeding six months, until the advanced sum has been thereby recovered. The regulation, 18 N.Y.C.R.R. §352.7(g)(7), provides in part that:

For a recipient of public assistance who is being evicted for nonpayment of rent for which a grant has been previously issued, an advance allowance may be provided to prevent such eviction or rehouse the family; and such advance shall be deducted from subsequent grants in equal amounts over not more than the next six months.

On March 3, 1972, this Court permanently enjoined the state from implementing and enforcing that regulation. The United States Court of Appeals for the Second Circuit vacated that order and remanded the case to this court for further consideration on June 5, 1972.

Two issues were presented by the Court of Appeals for consideration upon remand: first, whether the New York recoupment policy violates sections 402(a)(7) and 402(a)(10) of the Social Security Act, 42 U.S.C. 602(a)(7) and 602(a)(10), and applicable HEW regulations, and, second, whether such recoupment constitutes a reduction in grant so as to require the state to provide affected recipients with an opportunity for a fair hearing. The discussion in this brief is directed primarily to the first question, whether the recoupment provided for in the New York regulation contravenes federal requirements.

HEW believes that the New York regulation does contravene federal requirements because it assumes for particular months the existence of income and resources which by definition are not currently available for such months.¹ The Social Security Act does not permit the assumption, without proof that income which might have been available to a recipient in past months is still available. Instead, the actual availability of such income is the controlling test. The Act provides only for federal assistance with respect to state payments for current needs which have been determined to exist in the month for which the payment is made. It does not permit accelerated payments or repayable loans, which is,

¹ The New York regulation in issue has been submitted to HEW as part of the New York state plan. HEW has not approved the plan provision and has apprised the state that the provision does not comport with federal requirements. (See Appendix A).

effectively, the characterization, which New York places upon such payments under 18 N.Y.C.R.R. 352.7(g)(7). The Social Security Act does not require states to provide such emergency payments as are authorized under the New York regulation, but if they do so, they must abide by the federal requirements governing determination of the availability of income and determination of need on an objective and equitable basis. The Act does provide, however, other mechanisms for attacking the emergency housing problems to which the New York regulation is addressed, including protective payments and emergency assistance.

DISCUSSION

I.

SECTION 352.7(g)(7) ASSUMES THE EXISTENCE OF RESOURCES NOT CURRENTLY AVAILABLE FOR THE SUPPORT OF THE RECIPIENT, THEREBY CONTRA-VENING SECTION 402(a)(7) OF THE SOCIAL SECURITY ACT AND IMPLEMENTING FEDERAL REGULATIONS GOVERNING THE CONSIDERATION OF INCOME, 45 C.F.R. 233.20(a)(3)(ii)(c).

Public assistance, generally, is a "residual" program, designed to provide financial aid for unmet subsistence needs after other income and resources have been taken into account. The public assistance programs under the Social Security Act were enacted to provide federal funds to states for assistance granted by the states to certain specified categories of needy individuals. The Act sets out certain conditions that a state plan for AABD or AFDC²

²Plaintiffs in this case are recipients of Aid to Families with Dependent Children (AFDC) under the New York State AFDC program, established pursuant to Title IV of the Social Security Act, 42 U.S.C. 601 *et seq.* However, since §352.7(g)(7) applies both to the state's AFDC program, and its combination assistance

App. 4

must meet in order to qualify for federal funding; however, the state determines the standard of need applicable to individuals eligible for assistance under the programs and the degree to which the state will meet that need. See *King v. Smith*, 392 U.S. 309, 318-319 (1968); *Jefferson v. Hackney*, 406 U.S. 535 (1972).

The title IV and XVI programs are designed to offer financial support for individuals who are "needy". 42 U.S.C. 601, 606(a). This condition of eligibility for assistance under the programs necessarily involves evaluation as to the individual's needs and his means to satisfy them. Section 402(a)(7) of the Act, 42 U.S.C. 602(a)(7) requires that a state, in determining need, shall

take into consideration any other income and resources of any child or relative claiming aid to families with dependent children

A similar provision of the Act applies to state plans for AABD at 42 U.S.C. 1382(a)(14).

Although the statute does not contain a more explicit formula for determining need, it seems clear that Congress did not intend that welfare be given to individuals with sufficient means to maintain themselves: hence, the requirement that the states, in determining need, take into consideration the individual recipient's income and resources. On the other hand, Congress surely did not intend that individuals covered under the AFDC and AABD programs be charged with income and resources which are merely assumed to be at their disposal. Thus, HEW believes that while states are required to consider the individual's income and resources, they may consider

program for adults, Aid to the Aged, Blind and Disabled (AABD), established pursuant to Title XVI of the Act, 42 U.S.C. §1381 *et seq.*, reference is made in this brief to its applicability to both programs.

App. 5

only those items which the recipient actually has at his disposal. Thus, HEW has consistently interpreted these sections as permitting the states to consider as available to the recipient only income and resources which are actually at the recipient's disposal in a particular month, and as disallowing states from creating presumptions of availability of income. 45 C.F.R. 233.20(a)(3)(ii). 45 C.F.R. 233.20(a)(3)(ii)(c) states that a state plan for AFDC and AABD must provide that, in establishing financial eligibility and the amount of the assistance grant,

only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered.

The Supreme Court has upheld HEW's interpretation of 42 U.S.C. 602(a)(7) as embodied in the regulation (and its predecessor provisions) on a number of occasions. In *King v. Smith*, 392 U.S. 309 (1968), the Court held that Alabama could not find a child ineligible for AFDC simply because of the presence in his home of a "substitute father" who was presumed to support the child regardless of whether he did so in fact. While the Court found that any regular and actual contributions from the substitute father toward the child's support could be considered in determining the need of the child, it rejected the state's contention that the state could assume, without proof, that such income was being provided to the child. Relying heavily on the HEW Handbook of Public Assistance Administration (now superseded by 45 C.F.R. 233.20(a)(3)(ii)(c)), the Court stated:

Regulations of HEW, which clearly comport with the statute, restrict the resources which are to be taken into account under §602 to those "that are,

in fact, available to an applicant or recipient for current use on a regular basis. . . ." This regulation properly excludes from consideration resources which are merely assumed to be available to the needy individual. (392 U.S. at 319, n.16.)

Again, in *Lewis v. Martin*, 397 U.S. 552, at 559 (1970), the Supreme Court upheld the validity of the HEW regulation, leaving no doubt that it considered the HEW interpretation of 42 U.S.C. 602(a)(7) to be clearly justifiable. Similarly, in *Amos v. Engelman*, 333 F. Supp. 1109 (D.N.J. 1970), aff'd. 404 U.S. 23 (1971), the Supreme Court in effect re-affirmed the imprimatur which it had previously placed upon the HEW assumption-of-income rule in its earlier decisions. Although the Court did not address the issue specifically, it re-affirmed the decision of the district court on this point:

We do, however, conclude that wherever New Jersey uses the income of a stepfather or paramour without proof of its availability, it violates the federal statute. *Lewis v. Martin, supra*. This is true although there is no provision in the New Jersey regulation like the one in California which conclusively presumes the needs of the children are reduced by the amount of income from the man in the house. (333 F. Supp. 1119)

The issue presented here as to whether recoupment violates federal standards is much the same as that presented in *Acosta v. Swank*, 312 F. Supp. 765 (N.D. Ill. 1970); 318 F. Supp. 1348 (N.D. Ill. 1970), which involved a "duplicate assistance" payment system under which the state recovered, by means of deductions from subsequent assistance checks, amounts furnished as emergency disbursements for food and clothing. In that case, the Court ruled initially that the Illinois "duplicate assist-

ance" policy did not deny plaintiffs equal protection of the law and was not in conflict with 45 C.F.R. 233.20(a)(3)(ii)(c). 312 F. Supp. 765. On rehearing, after HEW had filed a brief as *amicus curiae* in which it took the position that the Illinois regulations contravened federal requirements, the court withdrew its earlier decision, noting that as a result of negotiations with HEW, the state had amended its policy so as to conform with the HEW regulation:

The court finds implicit in the above statements the admission that when this court's opinion was filed there was a conflict between the Illinois Department of Public Aid "duplicate assistance" policy and HEW regulations; and further finds that its opinion of May 11, 1970 should be and it is hereby withdrawn. (318 F. Supp. 1349-1350)

The critical issue to be determined in the present case revolves around the meaning of the term "available". HEW believes that in those instances in which the state recoups from the recipient's assistance check the amount which the recipient has previously received as an advance rent allowance pursuant to section 352.7(g)(7), it in effect assumes that the funds extended to a recipient to meet an emergency in one month remain available for his support in a subsequent six-month period. This sort of assumption of income availability violates a central tenet of the federal program. An emergency disbursement for rent is issued to meet an actual current need of the recipient. The basis for federal matching of such a disbursement at the time it is made is that it will be spent to satisfy only a need which exists in the month for which the assistance is granted, not that it will be used to permit the recipient to accumulate savings. The Social Security Act does not permit accelerated payments or repayable loans. It deals only in terms of present need, as determined each month.

Although New York apparently claims that its policy is merely an administrative device for recovering excess assistance, the underlying rationale and necessary effect of the policy nevertheless is to assume that the emergency disbursal, which was made to meet current needs, remains available to the recipient in later months, thereby producing the very result which the HEW regulation is designed to prevent. The regulation seeks to prevent the states from relying upon presumptions about the availability of income in any month without proof of the validity of the presumption in each particular case.³

Moreover, for purposes of claiming federal matching funds, New York treats these disbursals as correct payments. Federal funds can be utilized only to match payments of assistance, but not payments otherwise characterized, such as loans. There is, then, no reason to treat these disbursals differently from any other correct payment.

Finally, we would emphasize the words of the Social Security Act. The state agency, in determining need, shall

³One application of the general principle that the state may consider only actually available income and resources in determining need is found in 45 C.F.R. §233.20(a)(3)(ii)(d) which provides that states may not recover overpayments of assistance for any month by reductions in future assistance checks unless the recipient has at his disposal resources equal to the amount of the proposed reduction (except where caused by the recipient's wilful failure to disclose relevant information). That regulatory provision is not directly involved here. However, it does present an instructive analogy for the instant case. If the state's right to recover overpayments, which by definition are mistaken payments to the recipient exceeding his needs for that month, is so restricted, it is even more important that the state not be allowed to recover an emergency payment which was correctly issued to meet an actual present need by a device that considers income or resources not in fact available to the recipient.

take into consideration any *other* income and resources. 42 U.S.C. 602(a)(7) 1382(a)(14). Assistance which was correctly paid in the past is not to be taken into consideration.

B. 18 N.Y.C.R.R. §352.7(g)(7) is inconsistent with the federal requirement in section 402(a)(10) of the Social Security Act and implementing federal regulations that assistance be paid to all eligible individuals.

The New York policy is also inconsistent with other provisions of the Social Security Act and regulations dealing with the amount of the assistance payment. Section 402(a)(10) of the Act, 42 U.S.C. 602(a)(10).

*** requires that a state AFDC plan must provided that:

all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals . . .

A similar requirement is imposed on AABD plans by 42 U.S.C. 1382(a)(8). Federal regulations on need and amount of assistance, 45 CFR §233.20(a)(1), establish as an overriding general principle that a state AFDC and AABD plan must

Provide that the determination of need and amount of assistance for all applicants and recipients will be made on an equitable and objective basis and all types of income will be taken into consideration in the same way, except when otherwise specifically authorized by Federal statute.

More particularly, these provisions have been interpreted by HEW to require formal procedures for determination

App. 10

of eligibility and the amount of the assistance check. Part IV, Section 5200, of the Handbook of Public Assistance Administration which covers the authorization of award provides that:

The authorization of award serves the dual purpose of certifying eligibility and signifying the agency's decision to grant assistance in a specified amount. The authorization of award thus becomes a matter of formal agency record which certifies that the recipient has met the conditions set forth for eligibility and extent of need, and that, *unless and until those conditions are changed or the recipient's circumstances change, the recipient may look to the agency to fulfill its expressed intention to make regular payments in the amount awarded.* (Emphasis added).

The award authorization is made when the state agency acts favorably on an individual's application. When the amount of the award is changed, federal regulations require prior notice and opportunity for hearing.

Thus, although the states have a great degree of discretion in determining the standard of need of individuals covered by the various public assistance programs and the degree to which the state will meet that need, once the state has made its determination in regard to a particular individual or family, it is bound by its initial determination until it formally concludes that a change in circumstances warrants a redetermination. The state must treat all individuals fairly, equitably, and according to formal procedures in the process of assessing eligibility and amount of assistance payment. Moreover, all individuals with the same needs and the same income and resources must be dealt with in the same manner.

The emergency housing cost disbursements at issue here are provided at state option. The state does not have to make

such payments, but if it does, it must do so equitably, in accordance with formal procedures. The New York policy results in situations in which, in some months, the recipient receives an assistance payment that is lower than the amount of the authorized award. Yet, the state has made no redetermination of award on the basis of changed circumstances. Nor should such a redetermination have been made, since the recipient is still as needy. Indeed, the only time the recipient's circumstances changed was months earlier, and then for the worse.

C. The New York regulation frustrates the primary purposes of the Act

It has been argued that the New York recoupment policy is designed to deter mismanagement of the assistance grant by recipients. There can be no doubt that the state has a valid interest in dealing effectively with situations in which recipients are unable to manage their assistance checks. A recipient who constantly requires emergency aid because of mismanagement uses state public assistance funds which could be given to recipients who manage them properly. HEW does not question the validity of the state interest in avoiding this result, but only the fact that the means chosen to accomplish this interest conflict with a primary purpose of the Act and effectively punish the needy child for parental mismanagement. If the purpose of the AFDC program were to train needy individuals in the proper techniques of money management, the New York advance or duplicate assistance policy might not present a problem. However, that is not a primary purpose of the Act.

Congress has clearly stated in section 401 of the Social Security Act, 42 U.S.C. 601, that the purpose of the AFDC program is to enable the states to provide needy, dependent children with financial assistance and social

services. The Supreme Court has found that states may not pursue other interests in connection with the AFDC program by means which frustrate this primary purpose. In *King v. Smith, supra*, Alabama defended its "substitute father" policy on the grounds that it served a valid state interest in discouraging immorality and illegitimacy. The Court stated:

"In sum, Congress has determined that immorality and illegitimacy should be dealt with through rehabilitative measures rather than measures that punish dependent children, and that *protection of such children is the paramount goal of AFDC.*" (392 U.S. at 325.) (Emphasis added)

Similar rationale was used in *Cooper v. Laupheimer*, 316 F. Supp. 264 (E.D. Pa. 1970), in which the court invalidated a Pennsylvania regulation providing for the recovery of duplicate assistance checks by reductions in the amount of future checks:

"[The State policy] punishes the child by depriving him of a substantial portion of AFDC assistance which he is eligible to receive because his mother mistakenly or fraudulently obtained an extra payment months ago. The State has a legal right to recover from the mother funds which she was not entitled to receive, but it cannot recover these funds by reducing current assistance to the child. The target and primary beneficiary of AFDC aid is the child; the mother is merely the conduit through which the funds are channeled to the child . . . the state cannot permit a child to starve or be deprived of aid that he needs because of the mother's budgetary mismanagement . . ." (316 F. Supp. at 269.)

The necessary effect of the New York policy is to reduce the amount of aid available for the support of the

needy child in those months in which reductions are made to recover the amount of the prior emergency payment. This necessarily means that, during that period, the needy child or children must survive on an amount that falls below the standard of need established by the state. Yet, the needy child has not mismanaged the past assistance payment or in any conscious way created the need for emergency assistance. For this reason, HEW feels that it is clearly contrary to the purposes of the AFDC program to deprive the child by causing a reduction in the current assistance check in order to achieve state interests, in this case, teaching proper money management to welfare recipients and providing for efficient utilization of limited state public assistance funds, that can be achieved in ways that do not run contrary to the purposes of the program. Other such methods are provided for in the Act. These are discussed in part D of this brief.

D. The purposes of the New York policy can be served by alternative means provided for under the Social Security Act.

Federal law and regulations provide means by which the state can protect itself against duplicate payments such as are involved here. Congress has recognized that recipient mismanagement is a pressing problem which must be solved in a way that will forward the purposes of the AFDC program. Section 406(b) of the Act, 42 U.S.C. 606(b) authorizes federal matching for protective payments made "to another individual who . . . is interested in or concerned with the welfare of such child . . .," and for vendor payments made directly to a person furnishing food, living accommodations, or other goods, services, or items. In enacting the Social Security Amendments of

1967 (which made mechanisms for protective and vendor payments mandatory on the states),⁴ Congress indicated clearly that this provision was "a tool to deal with an infrequent but persistent problem of misuse of assistance money." H.R. Rep. No. 544, 90th Cong., 1st Sess. 101-102 (1967). The record indicates that New York is in fact using this method of payment.

Title XVI also authorizes federal matching for protective payments for the aged, blind and disabled (but not vendor payments). Section 1605(a) of the Act, 42 U.S.C. 1385(a).

A second means for handling such situations for needy families with children is by provision of "emergency assistance", which may be matched by federal funds pursuant to Section 406(e) of the Social Security Act, 42 U.S.C. 606(e). Emergency assistance is designed to take care of the same sort of situations which §352.7(g)(7) covers, such as a recipient's loss of his home. New York has statutory authority for such assistance already in place. Section 350-j of the New York Social Services Law provides in part:

3. Emergency assistance to needy families with children shall be provided in accordance with the regulations of the department to children who are without available resources, and when such assistance is necessary to avoid destitution or to provide them with living arrangements in a home,

⁴The requirement under section 402(a)(15)(B)(ii) of the Act, 42 U.S.C. 602(a)(15)(B)(ii), that states have provisions for protective and vendor payments for Title IV non-WIN cases was repealed by Pub. L. 92-223, §3(a)(1) (December 28, 1971), effective July 1, 1972. States may now at their option provide or not for protective and vendor payments in such cases, with federal matching.

and such destitution or such need did not arise because such children or relatives refused without good cause to accept employment or training for employment.

E. Recoupment under 18 N.Y.C.R.R. §352.7 (g)(7) represents a reduction of the assistance grant for purposes of the fair hearing regulations.

The recoupment provided for under the New York regulation would thus be a "reduction" of assistance within the meaning of federal regulations requiring fair hearings in cases in which the grant is reduced, suspended, or terminated. 45 C.F.R. 205.10. Therefore, such recoupment may not properly be made without 15 days' advance notice of the intended reduction. However, as discussed, the recipient should not be required to resort to a state agency fair hearing, which would in any event be futile in light of the New York policy. Instead, the issue should be resolved by decision in this case that, insofar as New York does reduce the grant in this manner, it is violating federal standards.

App. 16

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

December 29, 1971

Mr. George K. Wyman, Commissioner
N.Y. State Dept. of Social Services
1450 Western Avenue
Albany, New York 12203

Re: Plan Submittal 71-68
(Standard of Assistance)

Dear Commissioner Wyman:

On November 15, 1971 we wrote you with reference to Submittal 71-61 advising that Regulation 352g(6), cited as 352g(7), in providing for deductions from subsequent grants of funds duplicated to avoid eviction is contrary to Federal Program Regulation 20-7. We would like to bring to your attention that Submittal 71-68 continues the cited provision now in Regulation 352.g(7) and adds a new subdivision (g) 5 of Regulation 352, which has the same deficiency relative to subsequent deductions of duplicated payments.

We have noted that in these two citations restrictive payments "may" be made of subsequent grants. Regulation 352.7(g)(1) providing for the handling of rent payments subsequent to fraudulent claims of non-receipt of checks also indicates use of a restrictive payment. As you know, restrictive payments are not subject to Federal participation unless they fall within the Federal program guides in Regulations 20-4 and 20-5 (Protective Payments).

App. 17

If it is felt that discussion of any of the foregoing is indicated, staff of the Regional Office is available.

Sincerely yours,

Elmer W. Smith
Regional Commissioner

P:bf

cc: Mr. Smith
Mr. B. Luger
Audit Agency

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Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-6476

Supreme Court, U. S.
FILED

OCT 9 1973

MICHAEL RODAK, JR., CL

CYNTHIA HAGANS, for herself and her two infant children, KIMBERLY and KOREY; BERTHA GRISSETT, for herself and her five infant children, DEBORAH, ANGELO, WILLIAM, LINDA and CYNTHIA; KATHRYN ZAVERZENEC, for herself and her infant child, DANA LYNN; KAREN HORNECK, for herself, her infant child, TODD, and her interuterine child yet unnamed; EURLEEN CARSON, for herself and her two infant children, TIMOTHY and CALVIN; BARBARA SIEMILLER, ELIZABETH ELY and BARBARA LYNCH, as individuals and on behalf of all other persons similarly situated,

Petitioners,

against

ABE LAVINE, as Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, as Commissioner of the Nassau County Department of Social Services,

Respondents.

**BRIEF FOR RESPONDENT STATE COMMISSIONER
ABE LAVINE**

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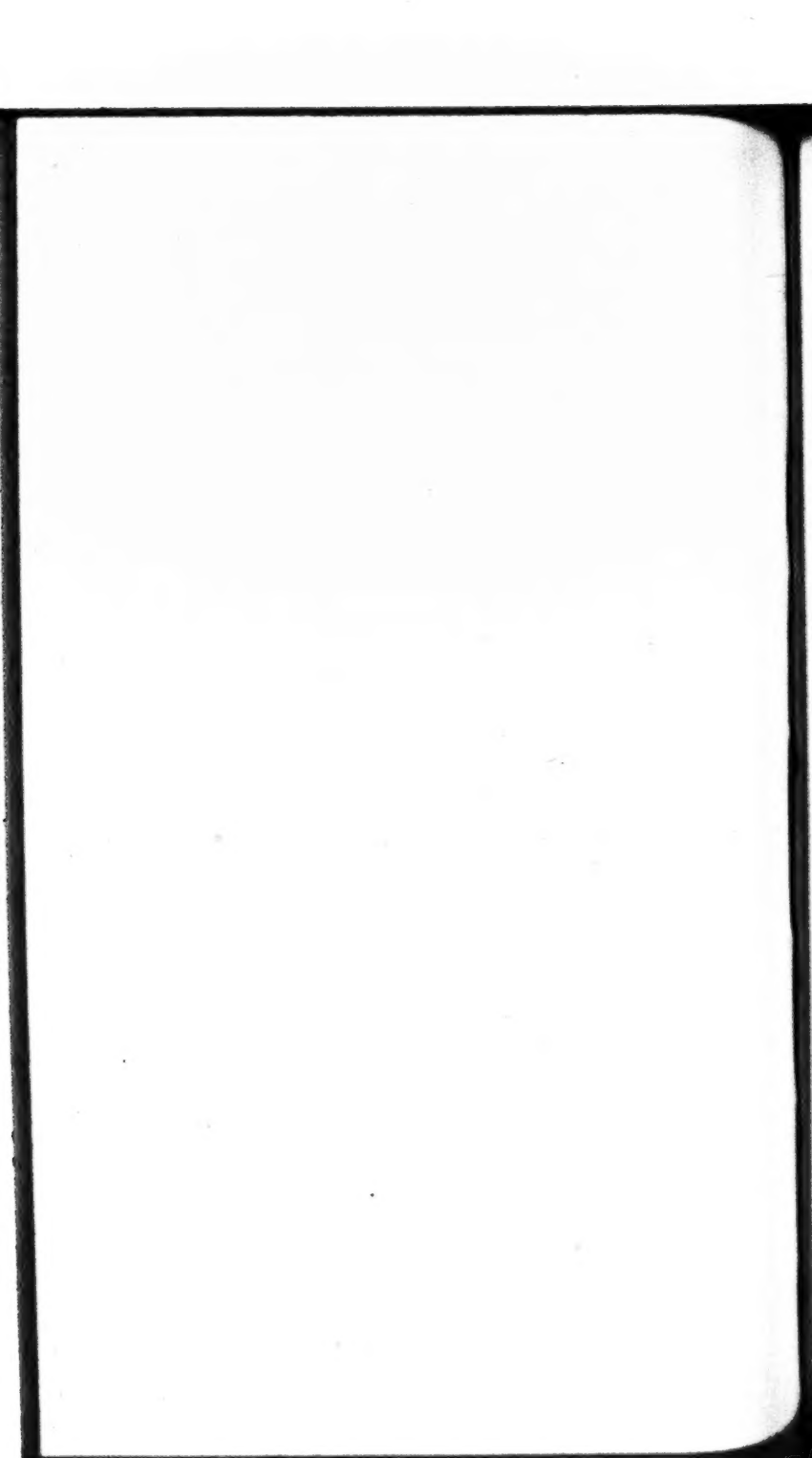


TABLE OF CONTENTS

	PAGE
Questions Presented	1
Statement of the Case	2
A. The Initial District Court Proceeding	3
B. The First Second Circuit Decision	5
C. The Second District Court Proceeding	6
D. The Second Circuit Court Proceeding	8
E. The Petition for Certiorari	9
Summary of Argument	9
POINT I—Petitioners' claim that they were denied equal protection of law does not raise a substan- tial constitutional question sufficient to establish jurisdiction under 28 U.S.C. § 1343(3)	12
A. The Standard for Determining Substantiality	14
B. Petitioners' Constitutional Claim is Insubstan- tial	19
POINT II—Absent a substantial constitutional ques- tion, the federal courts do not have jurisdiction under 28 U.S.C. §§ 1343(3) and (4) of a claim alleging a violation of the Social Security Act ..	28
A. Section 1983 Does Not Provide a Remedy for the Deprivation of Any "Rights" Secured by the Social Security Act	29
B. Section 1343(3) Does Not Provide Federal Jurisdiction For Claims Under § 1983 Alleg- ing Violations of the Social Security Act	34

	PAGE
C. Section 1343(4) Does Not Provide Federal Jurisdiction For Claims Under § 1983 Alleging Violations of the Social Security Act	42
D. Congress Explicitly Intended that There Be No Federal Jurisdiction for Social Welfare Suits Arising Under the AFDC Provisions of the Social Security Act	56
Conclusion	60

TABLE OF CASES

<i>Acosta v. Swank</i> , 312 F. Supp. 765 (N.D. Ill. 1970) ..	20, 26
<i>Acosta v. Swank</i> , 318 F. Supp. 1348 (N.D. Ill. 1970) ..	20
<i>Acosta v. Swank</i> , 325 F. Supp. 1157 (N.D. Ill. 1971) ..	40
<i>Adickes v. Kress & Co.</i> , 398 U.S. 144 (1970) ..	14, 32
<i>Aguayo v. Richardson</i> , 473 F. 2d 1090 (2d Cir. 1973)	27
<i>Almenares v. Wyman</i> , 453 F. 2d 1075 (2d Cir. 1971), cert. den. 405 U.S. 944 (1972)	39, 56
<i>American Commuters Association v. Levitt</i> , 279 F. Supp. 40 (S.D.N.Y. 1967), <i>aff'd</i> 405 F. 2d 1148 (2d Cir. 1969)	27
<i>Baker v. Carr</i> , 369 U.S. 186 (1962)	16, 42
<i>Bailey v. Patterson</i> , 369 U.S. 31 (1962)	16
<i>Bomar v. Keyes</i> , 162 F. 2d 136 (2d Cir. 1947), <i>cert.</i> <i>den.</i> 332 U.S. 825 (1947)	32, 39
<i>Bradford v. Juras</i> , 331 F. Supp. 167 (D. Ore. 1971) ..	26
<i>Brotherhood of Railroad Trainmen v. Baltimore & Ohio R.R. Co.</i> , 331 U.S. 519 (1947)	53
<i>Bulova Watch Co. v. United States</i> , 365 U.S. 753 (1961)	41

TABLE OF CONTENTS

iii

	PAGE
<i>Carter v. Stanton</i> , 405 U.S. 669 (1972)	26, 59
<i>Charleston v. Wohlgemuth</i> , 332 F. Supp. 1175 (E.D. Pa. 1971), <i>aff'd</i> 405 U.S. 970 (1972)	22
<i>Cooper v. Laupheimer</i> , 316 F. Supp. 264 (E.D. Pa. 1970)	26
<i>Dandridge v. Williams</i> , 397 U.S. 471 (1970)	6, 10, 12, 17, 18, 19, 22, 23, 24, 25, 26, 27, 58
<i>Duplex Printing Press Co. v. Deering</i> , 254 U.S. 443 (1921)	44
<i>Dyer v. Kazuhisa Abe</i> , 138 F. Supp. 220 (D. Hawaii 1956), <i>rev'd</i> 256 F. 2d 728 (9th Cir. 1958)	41
<i>Ex parte Poresky</i> , 290 U.S. 30 (1933)	9, 15, 16, 17
<i>First National Bank of Logan v. Walker Bank & Trust Co.</i> , 385 U.S. 252 (1966)	53
<i>Georgia v. Rachel</i> , 384 U.S. 780 (1966)	11, 38, 39
<i>Gomez v. Florida State Employment Service</i> , 417 F. 2d 569 (5th Cir. 1969)	33, 56
<i>Goosby v. Osser</i> , 409 U.S. 512 (1973)	9, 15, 16
<i>Greenwood v. Peacock</i> , 384 U.S. 808 (1966)	32, 38
<i>Hagans v. Wyman</i> , 462 F. 2d 928 (2d Cir. 1972)	6
<i>Hagans v. Wyman</i> , 471 F. 2d 347 (2d Cir. 1973)	9
<i>Hague v. Congress of Industrial Organizations</i> , 307 U.S. 496 (1939)	32
<i>Hanley v. Volpe</i> , 305 F. Supp. 977 (E.D. Wis. 1969) ..	27
<i>Hannis Distilling Co. v. Mayor and City Council of Baltimore</i> , 216 U.S. 285 (1910)	15
<i>Holloway v. Parkham</i> , 340 F. Supp. 336 (N.D. Ga. 1972)	26

	PAGE
<i>Holt v. Indiana Manufacturing Co.</i> , 176 U.S. 68 (1900)	32, 38
<i>Idlewild Bon Voyage Liquor Corp. v. Epstein</i> , 370 U.S. 713 (1962)	15
<i>Irvine v. California</i> , 347 U.S. 128 (1954)	14
<i>Indiana Employment Security Division v. Burney</i> , 409 U.S. 540 (1973)	13
<i>Jefferson v. Hackney</i> , 406 U.S. 575 (1972) ..	10, 18, 23, 24, 26
<i>Jones v. Alfred H. Mayer Co.</i> , 392 U.S. 409 (1968) ..	35, 53
<i>King v. Smith</i> , 392 U.S. 309 (1968)	33, 34, 42
<i>Lawn v. United States</i> , 355 U.S. 339 (1958)	14
<i>Lehnhausen v. Lake Shore Auto Parts Co.</i> , 410 U.S. 356 (1973)	19
<i>Levering & Garrigues Co. v. Morrin</i> , 289 U.S. 103 (1933)	15, 16
<i>Levy v. Louisiana</i> , 391 U.S. 68 (1968)	22
<i>Lindauer v. Oklahoma City Urban Renewal Author- ity</i> , 452 F. 2d 117 (10th Cir. 1971), <i>cert. den.</i> 405 U.S. 1017, <i>reh. den.</i> 406 U.S. 911 (1972)	27
<i>Lynch v. Household Finance Corp.</i> , 405 U.S. 538 (1972)	31, 39, 42
<i>Matter of Griffith v. Wyman</i> , 39 A.D. 2d 874, 333 N.Y.S. 2d 703 (1st Dept. 1972)	41
<i>Matter of Howard v. Wyman</i> , 28 N.Y. 2d 434, 322 N.Y.S. 2d 683 (1971)	24
<i>Mattingly v. Elias</i> , 325 F. Supp. 1374 (E.D. Pa. 1971)	39, 40, 56
<i>McCall v. Shapiro</i> , 416 F. 2d 246 (2d Cir. 1969)	39, 56

TABLE OF CONTENTS

v

	PAGE
<i>McClellan v. Shapiro</i> , 315 F. Supp. 484 (D. Conn. 1970)	58
<i>McDonald v. Board of Election Commissioners</i> , 394 U.S. 802 (1969)	15
<i>McGinnis v. Royster</i> , 410 U.S. 263 (1973)	10, 24
<i>McGuire v. Amrein</i> , 101 F. Supp. 414 (D. Md. 1951) ..	39
<i>Mitchum v. Foster</i> , 407 U.S. 225 (1972)	31, 58
<i>Money v. Swank</i> , 432 F. 2d 1140 (7th Cir. 1970)	26
<i>Monroe v. Pape</i> , 365 U.S. 167 (1961)	11, 31, 32, 41, 42
<i>Moor v. County of Alameda</i> , 411 U.S. 693 (1973) ...	54, 55
<i>Morgan v. Kennedy</i> , 331 F. Supp. 861 (D. Neb. 1971)	21
<i>New York v. Galamison</i> , 342 F. 2d 255 (2d Cir. 1965), cert. den. 380 U.S. 977 (1965)	38
<i>New York State Department of Social Services v. Dublino</i> , — U.S. —, 41 U.S.L.W. 5047 (1973)	22
<i>Oklahoma v. Civil Service Commission</i> , 330 U.S. 127 (1947)	34
<i>Pierson v. Ray</i> , 386 U.S. 547 (1967)	34
<i>Preiser v. Rodriguez</i> , 411 U.S. 475 (1973)	58
<i>Richards v. United States</i> , 369 U.S. 1 (1962)	55
<i>Rosado v. Wyman</i> , 414 F. 2d 170 (2d Cir. 1969), rev'd 397 U.S. 397 (1970)	56
<i>Rosado v. Wyman</i> , 397 U.S. 397 (1970) ..	6, 10, 22, 28, 33, 58
<i>San Antonio Independent School District v. Rodriguez</i> , 411 U.S. 1 (1973)	19, 24, 25
<i>Schatte v. International Alliance of Theatrical Stage Employees</i> , 182 F. 2d 158 (9th Cir. 1950), cert. den. 340 U.S. 827, reh. den. 340 U.S. 885 (1950) ..	58

	PAGE
<i>Serritella v. Engelman</i> , 339 F. Supp. 738 (D. N.J. 1972), <i>aff'd</i> 462 F. 2d 601 (3rd Cir. 1972)	40
<i>Slaughterhouse Cases</i> , 16 Wall. 36 (1872)	32
<i>Smith v. Follette</i> , 445 F.2d 955 (2d Cir. 1971)	27
<i>Snell v. Wyman</i> , 281 F. Supp. 853 (S.D.N.Y. 1968), <i>aff'd</i> 393 U.S. 323 (1969)	21, 22
<i>Swift & Co. v. Wickham</i> , 382 U.S. 111 (1965)	16
<i>Tenney v. Brandhove</i> , 341 U.S. 367 (1951)	33
<i>United Mine Workers v. Gibbs</i> , 383 U.S. 715 (1966) ..	16, 28
<i>United States v. Price</i> , 383 U.S. 787 (1966)	32
<i>United States v. St. Paul, Minneapolis & Manitoba Ry. Co.</i> , 247 U.S. 310 (1918)	45
<i>Waier v. Schmidt</i> , 318 F. Supp. 22 (E.D. Wis. 1970) ..	27
<i>Ward v. Winstead</i> , 314 F. Supp. 1225 (N.D. Miss. 1970)	6
<i>White v. Gates</i> , 253 F. 2d 868 (D.C. Cir. 1958), <i>cert. den.</i> 356 U.S. 973 (1958)	27
<i>Wyman v. James</i> , 400 U.S. 309 (1971)	21
<i>Wynn v. Indiana State Department of Public Welfare</i> , 316 F. Supp. 324 (N.D. Ind. 1970)	33

TABLE OF STATUTES

Civil Rights Act of 1866	29, 30, 31, 36, 38, 42
Civil Rights Act of 1870	30, 31, 36
Civil Rights Act of 1871	29, 30, 31, 36, 38, 39, 41, 56
Civil Rights Act of 1957	43
New York Social Services Law § 131-a	1

TABLE OF CONTENTS

vii

	PAGE
New York Session Laws, L. 1973, Chap. 150	2
Revised Statutes § 563(12)	30, 35, 37
§ 629(16)	30, 35
§ 1977	35, 37
§ 1979	30, 35
Rule 65(a)(2)—Fed. Rules Civ. Proc.	4
Social Security Act of 1935	2, 57
14 Stat 27	29, 30
14 Stat 74	30
14 Stat 75	30
16 Stat 140	30
17 Stat 13	30
18 Stat 113	30
36 Stat 1092	37
71 Stat 634	43
Supreme Court Rule 40(1)(d)(2)	14
Thirteenth Amendment	32, 34, 37, 39, 40, 44
Fourteenth Amendment	31, 32, 34, 37, 39, 40, 44
Fifteenth Amendment	32, 34, 37, 39, 40, 44
18 NYCRR § 352.7(g)(7)	3, 5, 6, 7
28 U.S.C. § 1331	34, 42, 56
§ 1333	58
§ 1334	58
§ 1337	58

	PAGE
§ 1338	58
§ 1339	58
§ 1340	58
§ 1343	3, 9, 11, 30, 39, 40, 48, 54, 56, 60
§ 1343(3)	1, 2, 6, 10, 11, 12, 28, 34, 37, 39, 40, 41, 42, 54
§ 1343(4)	1, 10, 11, 28, 42, 43, 44, 47, 48, 50, 52, 53, 54, 55, 56
§ 1443	38
§ 2201	3
§ 2202	3
§ 2281	15
42 U.S.C. § 405(b)	58
§ 405(g)	58
§ 601	57
§ 602(a)	57
§ 602(a)(7)	3, 5, 7
§ 602(a)(10)	3, 5, 7
§ 602(a)(14)	23
§ 603	59
§ 604	12, 34
§ 1971	30, 43
§ 1981	29, 30, 35
§ 1982	29, 30
§ 1983	3, 10, 11, 28, 29, 30, 31, 32, 33, 34, 35, 37, 39, 40, 41, 42, 43, 54

TABLE OF CONTENTS

ix

	PAGE
§ 1985	44, 49
§ 1988	54
§ 1993	50, 55
45 C.F.R. § 233.20(a)(3)(ii)(c)	3, 5
§ 233.20(a)(3)(ii)(d)	5, 7
§ 233.20(a)(12)	7

OTHER AUTHORITIES

Cong. Globe, 42d Cong., 1st Sess. (1871)	31
2 Cong. Rec. 825	30
103 Cong. Rec. 8496	45
8498	45
9038	45
9039	46
9040	46
9367	46
9372	45
9385	47
9386	47
11974	48
11980	48, 52
11981	49
11998	49
12076	49

	PAGE
12077	49, 53
12284	49, 50, 52
12403	52
12545	49, 51
12548	51
12557	50
12559	51, 52, 54
12565	49, 52
H.R. 627	46
H.R. 6127	43, 46
1 Revision of U.S. Statutes, Title 13 (1872 draft) ...	36
S. Rep. No. 388, pt. 1, 61st Cong., 2d Sess., 15 (1910)	37
Goldman, Eric R., <i>The Crucial Decade—and After</i> , Vintage Books, 1960, pp. 297-98	55
Note, "Federal Jurisdiction Over Challenges to State Welfare Programs," 72 Columbia Law Review 1404 (1972)	31, 36, 37, 38, 56
Note, "The Proper Scope of the Civil Rights Acts," 66 Harvard Law Review 1285 (1953)	38, 58
U.S. Code Cong. & Adm. News, H. Rept. 291, 85th Cong., 1st Sess., 1966 (1957)	43, 46, 53

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-6476

CYNTHIA HAGANS, for herself and her two infant children, KIMBERLY and KOREY; BERTHA GRISSETT, for herself and her five infant children, DEBORAH, ANGELO, WILLIAM, LINDA and CYNTHIA; KATHRYN ZAVERZENCE, for herself and her infant child, DANA LYNN; KAREN HORNECK, for herself, her infant child, TODD, and her interuterine child yet unnamed; EURLLEN CARSON, for herself and her two infant children, TIMOTHY and CALVIN; BARBARA SIEMILLER, ELIZABETH ELY and BARBARA LYNCH, as individuals and on behalf of all other persons similarly situated,

Petitioners,

against

ABE LAVINE, as Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, as Commissioner of the Nassau County Department of Social Services,

Respondents.

BRIEF FOR RESPONDENT STATE COMMISSIONER ABE LAVINE

Questions Presented

1. Does petitioners' claim that they were denied equal protection of law because of a New York regulation requiring recoupment of a duplicate rent payment raise a substantial constitutional question sufficient to establish jurisdiction under 28 U.S.C. § 1343(3)?

2. Absent a substantial constitutional question, do the federal courts have jurisdiction of a claim alleging a violation of the Social Security Act under 28 U.S.C. §§ 1343(3) and (4)?

Statement of the Case

Petitioners¹ are recipients of Aid to Dependent Children under New York law. New York participates in the federal program of Aid to Families with Dependent Children (AFDC) under the Social Security Act of 1935 and provides a schedule of payments to these families based upon the number of individuals in a household. New York Social Services Law, § 131-a [McKinney Supp. 1972]. Petitioners thus receive monthly grants consisting of a shelter grant to pay for rent, a fuel grant to pay for heating, and a basic needs grant to pay for their other necessities.² Petitioners misappropriated their shelter grants and used the monies that were earmarked for rent for other purposes.³ Each was then threatened with eviction for non-

¹ In accordance with the rules of this Court, respondent will use the terms "petitioners" and "respondents" in referring to the parties. Petitioners' brief uses the terms "appellants" and "appellees".

² The schedule set forth in Section 131-a determines the basic needs grant on a state-wide basis. Each social service district establishes a maximum schedule of monthly shelter allowances which is added to the basic needs grant. In July, 1971, New York enacted a 10% ratable reduction in the level of benefits. This reduction was eliminated in 1973, effective January 1, 1974, and all recipients will then receive 100% of this standard of need. N.Y. Session Laws, L. 1973, Chap. 150.

³ Cynthia Hagans voluntarily chose to live in an apartment where the rent was higher than her shelter allowance. Bertha Grissett alleged that her check was stolen, and after the commencement of this action, the Nassau County Department of Social Services determined that it had improperly ordered recoupment from Mrs. Grissett and restored her full grant. [See A 80, fn. 2].

payment of rent and court proceedings were brought by the respective landlords.

The local Department of Social Services intervened in each case and paid the back rents of each of the named petitioners in order to forestall eviction. Pursuant to 18 NYCRR 352.7(g)(7), the amount of extra monies supplied by the local Department for back rents "shall be deducted from subsequent grants in equal amounts over not more than the next six months". The local department therefore deducted the extra monies allotted over the subsequent six months.*

A. The Initial District Court Proceeding

Petitioners brought the instant action pursuant to 28 U.S.C. § 1343, 28 U.S.C. §§ 2201 and 2202, 42 U.S.C. § 1983 and the Fourteenth Amendment [A 6]. They challenged the above regulation as denying them equal protection because recoupment of the extra payment resulted in their being treated differently from other recipients of public assistance who were not subjected to recoupment because they did not receive extra payments [A 13-14]. Their complaint additionally alleged that the regulation violated due process because it did not contain any standards regarding the circumstances resulting in non-payment [A 14]. Petitioners further claimed that the recoupment regulation violated 42 U.S.C. § 602(a)(7) and (a)(10) and the regulations promulgated thereunder as set forth in 45 C.F.R. § 233.20(a)(3)(ii)(c), because these provisions allegedly required that current needs of recipients must

* Cynthia Hagans had the full amount of her extra rent payment recouped in one month because she moved out of Nassau County the next month [A 34]. It is doubtful that such a determination by the County would ever have been sustained by the State, but Mrs. Hagans never requested a hearing before respondent Lavine contesting this allocation. She ultimately was reimbursed by Nassau County for the full amount of the money recouped.

always be met regardless of previous misallocations of welfare payments [A 12-13].

By order dated February 18, 1972, the District Court temporarily restrained respondents from implementing the aforesaid State regulation pending hearing and determination by a single judge court of the statutory claim (MISHLER, J.) [A 30-31]. The petitioners withdrew their application for a three-judge court [A 66]. In their brief in support of the temporary restraining order, petitioners raised solely their equal protection claim in support of their constitutional argument.

On February 28, 1972, a trial was held pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure. Arthur J. Doring, a consultant with the State Department of Social Services [A 40] testified that he wrote the regulation at issue [A 48] after conducting a thorough study of housing conditions and the problems of eviction in Nassau County [A 40-43]. There is an acute housing shortage in Nassau County [A 52]. The regulation thus allowed a recipient who misallocated her rent money to forestall eviction by receiving an advance allowance on her rent—in keeping with the Department's recognized obligation to provide shelter [A 49]. The provision for recoupment of rent payments was added to discourage mismanagement and prevent wide-spread abuse [A 42, 48, 57]. Prior to this regulation, the State had no policy on duplicate payments and would not reimburse any locality that advanced rent allowances [A 42].

The regulation was not intended to be applied to recoupment of rent monies lost by theft [A 48, 49], nor was it intended to require advance allowances without the consent of the recipient [A 50]. If any recipient felt aggrieved by the implementation of the regulation, he or she always had the right to ask for a Fair Hearing to determine whether the regulation had been properly applied [A 47, *et seq.*].

Mr. Joseph Barry of the Nassau County Department of Welfare testified that prior to the formulation of the recoupment regulation, the County would not repay the rent of recipients who had misallocated their rent monies. Consequently, they were evicted, and the local departments were forced to house these people in motels until adequate substitute housing could be found [A 62-63].

By decision dated March 3, 1972 [A 66-71], the District Court (MISHLER, J.) found that 18 NYCRR 352.7(g)(7) violated the Social Security Act and the regulations thereunder. The Court cited 42 U.S.C. § 602(a)(7) and (10) and 45 CFR § 233.20(a)(3)(ii) (c) and (d) and implied that these sections required that the current needs of an AFDC family must be met. The District Court held that it had pendent jurisdiction over these statutory issues because petitioners' equal protection claim was substantial [A 68]. The order of the Court, dated March 14, 1972, permanently enjoined the enforcement of the regulation [A 75-76].

B. The First Second Circuit Decision

Respondent State Commissioner Wyman^{*} appealed to the United States Court of Appeals for the Second Circuit. Aside from defending the merits of the statute, he argued that the federal courts did not have jurisdiction over the action because no substantial constitutional question was presented. Petitioners responded that their equal protection claim was substantial; they additionally raised a new constitutional claim—that the alleged unavailability of notice and hearing to contest the recoupment denied them due process. They made no mention of the due process claim alleged in their complaint as to the lack of standards in the regulation.

^{*} George K. Wyman resigned as Commissioner of Social Services on March 31, 1972, and was replaced by Abe Lavine on May 1, 1972. A substitution of parties has been made in this Court.

By decision dated June 15, 1972, the Second Circuit vacated the order of the District Court and remanded the case for further proceedings [A 79-84] (462 F. 2d 928). The majority found jurisdiction under 28 U.S.C. § 1343(3) because this Court had recently "laid to rest . . . the distinction between personal liberties and proprietary rights as a guide to the contours of § 1343(3) jurisdiction." [A 81] However, the majority made no finding as to which, if any, of petitioners' constitutional claims was substantial. Rather, it determined that it could not consider petitioners' due process claim of lack of notice and hearing until petitioners actually attempted to obtain hearings ["until the question of fair hearings is resolved, it is premature to permanently enjoin implementation of § 357(g)(7)"] [A 82].⁶ Moreover, the majority declined to decide any of the issues raised until these state administrative procedures were utilized because "it is not yet clear how the state will interpret or implement its recoupment regulation" [A 82].

Judge Lumbard, in dissent, voted to reverse on the merits. He found that 18 NYCRR 352.7(g)(7) was a valid exercise of the State's power to make regulations governing the payment of welfare grants and was not in conflict with federal law [A 83-84].⁷

C. The Second District Court Proceeding

The five original named plaintiffs never complied with the mandate of the Second Circuit that they request hearings. In point of fact, the Nassau County Department of

⁶ The State had vigorously argued that state Fair Hearings were always available to petitioners. [See A 47, *et seq.*]

⁷ Given the broad discretion of the State to give a percentage of the standard of need and to set maximum limits on AFDC grants, it is clear that there is no federal requirement that the current needs of recipients be met. *Rosado v. Wyman*, 397 U.S. 397 (1970); *Dandridge v. Williams*, 397 U.S. 471 (1970). *Cf. Ward v. Winstead*, 314 F.Supp. 1225 (N.D. Miss. 1970).

Social Services had reimbursed all of these original plaintiffs for the money that it initially recouped. Therefore, aside from their failure to comply with the Second Circuit's mandate, none of the original plaintiffs had a cause of action remaining and none could form the basis of any class attacking the regulation at issue.

In the light of this event, counsel for petitioners moved to intervene new plaintiffs who had live grievances and who had had state Fair Hearings. An intervenors' complaint, dated September 29, 1972, was thus filed in the District Court. This complaint raised similar issues as were raised previously with one exception—the due process claim as to an alleged lack of standards in the regulation, which had never been pressed since the filing of the original complaint, was now formally abandoned [see A 107-110]. By opinion and order dated October 19, 1972, the District Court again permanently enjoined the enforcement of 18 NYCRR 352.7(g)(7) [A 112-117]. It again held that the State regulation contravened 42 U.S.C. §§ 602(a)(7) and (a)(10) and 45 C.F.R. § 233.20(a). The decision relied in part on an *amicus* brief filed by the Department of Health, Education and Welfare that suggested that the regulation violated federal regulations.*

* Whatever the prior views of HEW, they are no longer the views of that department. 45 C.F.R. § 233.20(a)(3)(ii)(d) has now been repealed and § 233.20(a)(12) has been added effective October 15, 1973. This new section explicitly sanctions recoupment regardless of the reason for the additional payment. It states:

§ 233.20 Need and amount of assistance.

(a) Requirements for State plans.

* * *

(12) Recoupment of overpayments and correction of underpayments. Specify uniform Statewide policies for:

(i) Recoupment of overpayments of assistance, including overpayments resulting from assistance paid pending a hearing decision; Under this requirement:

(footnote continued on following page)

D. The Second Circuit Court Proceeding

Respondent Wyman then appealed to the Court of Appeals for the Second Circuit, again claiming, in addition to an argument on the merits, that the federal courts did

(footnote continued from preceding page)

(A) The State may recoup any overpayment (election by the State not to recoup overpayments shall not waive the provision of §§ 205.40, 205.41 or any other quality control requirement);

(B) Except where there is evidence which clearly establishes that a recipient willfully withheld information about his income and resources, recoupment shall be limited to overpayments made during the 12 months preceding the month in which the overpayment was discovered;

(C) The plan may provide for recoupment from available income and resources (including disregarded, set-aside or reserved items) or from current assistance payments or from both; and

(D) If the recoupments are made from current assistance payments, the State shall establish reasonable limits on the proportion of such payments that may be deducted, so as not to cause undue hardship on recipients.

(E) The plan may provide for recoupment in all situations or in specified circumstances and for waiver of the overpayment where the cost of collection would exceed the amount of the overpayment.

(ii) Prompt correction of underpayments to current recipients, resulting from administrative error where the State plan provides for recoupment of overpayments. Under this requirement:

(A) Retroactive corrective payment shall be made only for the 12 months preceding the month in which the underpayment is discovered;

(B) For purposes of determining continued eligibility and amount of assistance, such retroactive corrective payments shall not be considered as income or as a resource in the month paid nor in the next following month; and

(C) No retroactive payment need be made where the administrative cost would exceed the amount of the payment.

not have jurisdiction to hear this case because the constitutional claim alleged was insubstantial. Petitioners responded by arguing that their equal protection claim was substantial. They made no mention whatever of any due process claim.

The Second Circuit reversed the decision of the District Court on the ground that no substantial constitutional claim was presented by petitioners' equal protection argument [471 F. 2d 347] [A 120-124]. The Second Circuit remanded the case to the District Court to dismiss for want of jurisdiction, since the absence of a substantial constitutional claim deprived the District Court of jurisdiction to decide the statutory claims [A 124].

E. The Petition for Certiorari

Petitioners requested certiorari from this Court by petition dated March 29, 1973, claiming that the Court below erred because their equal protection claim was substantial and because jurisdiction existed under 28 U.S.C. § 1343. They made no mention of any due process claim. This Court granted certiorari on June 11, 1973.

Summary of Argument

I

Respondents contend that the Court below correctly determined that the equal protection claim raised by petitioners was insubstantial. The Court correctly applied the standard set forth by this Court that the constitutional claim be "obviously without merit". *Goosby v. Osser*, 409 U.S. 512 (1973); *Ex parte Poresky*, 290 U.S. 30 (1933). A determination of whether a claim falls within this standard can be made by applying general equal protection principles of analysis in the field of social welfare.

A statutory classification does not offend the Equal Protection clause if any state of facts reasonably may be conceived to justify it. *Dandridge v. Williams*, 397 U.S. 471 (1970). This broad standard is especially applicable in social welfare classifications where states have broad discretion in allocating limited funds. *Jefferson v. Hackney*, 406 U.S. 575 (1972). An application of this standard to the facts of this case compels a finding of insubstantiality.

The equal protection claim raised herein is patently insubstantial. Petitioners claim that the State recoupment regulation creates two classes of needy children—those that receive duplicate payments and are subject to recoupment, and those who receive no extra payments and are not subject to recoupment. On its face, this claim is frivolous. The State can utilize its limited resources to treat all classes of recipients equally, as well as encourage proper management of welfare payments. The Social Security Act does not mandate the making of distinctions as to the needs of children in determining the amount of grants to a family. *Dandridge v. Williams, supra*. Nor does equal protection require that a specific goal of a statutory classification be met. *McGinnis v. Royster*, 410 U.S. 263 (1973). Given the especially broad discretion that States have in making statutory classifications in social welfare cases, petitioners' equal protection claim is obviously without merit. In the absence of a substantial constitutional claim, there can be no pendent jurisdiction over the statutory claim. *Rosado v. Wyman*, 397 U.S. 397 (1970).

II

The federal courts do not have jurisdiction under 28 U.S.C. §§ 1343(3) and (4) of a claim alleging a violation of the Social Security Act. Section 1983 does not provide a remedy for the deprivation of any "rights" secured by the Social Security Act. The history of § 1983 shows that Congress

was concerned solely with constitutional rights and the statutes enforcing such rights when it passed the Civil Rights Act of 1871. See *Monroe v. Pape*, 365 U.S. 167 (1961). The language "and laws" added to § 1983 by the revisers was inserted to ensure that actions brought pursuant to the substantive sections of the Civil Rights Acts were "authorized by law" within the meaning of Section 1343. Congress never intended to create a cause of action for every conceivable federal claim without any jurisdictional limitation merely because state action might be involved.

Even if this were the intention of Congress, there is no jurisdiction to hear these claims in the federal courts irrespective of the jurisdictional amount requirement. Section 1343(3) explicitly provides for jurisdiction only for rights secured by the Constitution or by "any Act of Congress providing for equal rights of citizens." The history of § 1343(3) shows that Congress meant exactly what it said. See *Georgia v. Rachel*, 384 U.S. 780 (1966).

Petitioners' attempt to show that § 1983 itself is an Act of Congress providing for equal rights is a "bootstraps" argument. Section 1983 creates a cause of action for the deprivation of rights enumerated elsewhere. It is the "civil action authorized by law to be commenced" under § 1343; it is not the act providing for the protection of equal rights. If § 1983 is such an act, then the language "and laws" in that section must also be so limited, and § 1983 would not encompass rights arising under the Social Security Act.

Section 1343(4) likewise does not provide jurisdiction for claims arising under the Social Security Act. The legislative history of that section shows that Congress in 1957 was concerned solely with providing federal jurisdiction for cases concerning protection of voting rights. The jurisdictional addition to § 1343 as to "civil rights, including the right to vote" was the "technical amendment" that the House Report says it was. During the Congressional debates, both the House and Senate made it clear that the provisions of the

bill ultimately passed would have nothing to do with social security in any manner whatever. The amended catchline of section 1343 specifically added the term "elective franchise".

Moreover, Congress explicitly intended that there be no federal jurisdiction for social welfare suits arising under the AFDC provisions of the Social Security Act. When Congress passed that Act in 1935, it specifically provided federal jurisdiction for actions by individual recipients under the Old Age, Survivors and Disability Insurance provisions, but set up an entirely different administrative scheme for the AFDC program whereby only a state could appear before the federal agency to defend its State plans on penalty of forfeiture of federal funds. 42 U.S.C., § 604. Congress clearly intended that the administration and enforcement of the AFDC programs be with the States.

POINT I

Petitioners' claim that they were denied equal protection of law does not raise a substantial constitutional question sufficient to establish jurisdiction under 28 U.S.C. § 1343(3).

Petitioners raised one, and only one, constitutional claim in the lower courts—that they were denied the equal protection of the law because the recoupment of advances made to forestall eviction resulted in lower subsequent grants of assistance than that available to other welfare recipients [see A 123].* The Second Circuit considered this

* In an effort to find a constitutional claim for the purpose of obtaining jurisdiction, petitioners present to this Court what they call a due process claim in that the regulation at issue creates irrebuttable presumptions contrary to fact [Pet. Brief, pp. 19-20]. They express bewilderment as to why the court below *sub silentio* ruled this claim to be insubstantial [Pet. Brief, p. 20], and attack the court below as erroneously applying *Dandridge v. Williams*, *supra*, to a due process claim [Pet. Brief, p. 33]. This expression

claim in the light of the guidelines for evaluating equal protection claims in social welfare cases and determined that the recoupment regulations had a rational basis [A 123]. In so ruling, the Court held that petitioners "clearly failed" to establish jurisdiction in the federal courts by advancing a substantial constitutional claim [A 123]. It is respectfully submitted that this holding is plainly correct and is a proper application of the stand-

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of criticism is outrageous, as they have never before raised this claim in any court.

When petitioners filed their first complaint, it contained along with the equal protection claim, a due process claim that the regulation was "without any standards regarding or requiring determination as to the circumstances resulting in non-payment" [A 14]. On their motion for a temporary restraining order in the District Court, petitioners argued solely that the equal protection claim was substantial. They never mentioned this due process claim again. The District Court thus ruled only that the equal protection claim was substantial [A 68], and, on appeal to the Second Circuit, that was the only claim argued by respondents. Petitioners, however, filed a responding brief defending their equal protection claim and raising a new due process claim to the effect that they were entitled to notice and hearings. They made no mention of any other due process claim. The Second Circuit remanded the case for petitioners to utilize the State fair hearing procedures that respondents had always emphasized were available.

By this time, the case had become moot as to all of the named plaintiffs because the local Department of Social Services had reimbursed them as to all of the monies recouped. Since this would have effectively destroyed the class action and mooted the case, *Indiana Employment Security Division v. Burney*, 409 U.S. 540 (1973), three new petitioners from other counties were intervened, and a new complaint was filed. No due process claim was articulated in this second complaint. [See A 101-111.] Once again, the District Court enjoined the regulation.

On appeal to the Second Circuit, respondents again asserted the insubstantiality of the equal protection claim, which was by now the only constitutional claim in this case. Petitioners defended solely on the grounds that the equal protection claim was substantial. The Second Circuit ruled it was not [A 123]. For petitioners to thus claim that the Second Circuit decided any due process claim to be insubstantial is ludicrous—no due process claim was ever presented or was even in the case.

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ards enunciated by this Court for the determination of substantiality.

A. The Standard for Determining Substantiality

Section 1343(3) of Title 28, U.S.C., gives the federal district courts original jurisdiction of civil actions to redress deprivations under color of State law of rights secured by the Constitution of the United States. In order for the district court to obtain jurisdiction, it must examine

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In their application for certiorari to this Court, petitioners claimed solely that the equal protection claim was substantial. They made no contention of any due process claim. It is only now, in their brief on the merits in this Court, that petitioners raise for the first time a due process claim—concerning the alleged existence of irrebuttable presumptions—a claim that was never even mentioned in petitioners' half-hearted attempt to allege a due process deprivation in their mooted initial complaint.

This Court has consistently stated that where an issue is neither raised nor considered by the Court of Appeals, it will not be considered by the Supreme Court unless there are exceptional circumstances. *Adickes v. Kress & Co.*, 398 U.S. 144, 147, n. 2 (1970); *Lawn v. United States*, 355 U.S. 339, 362-63, n. 16 (1958). See also *Irvine v. California*, 347 U.S. 128, 129 (1954); Supreme Court Rule 40(1)(d)(2) [Failure to raise claim in certiorari petition precludes review]. There are clearly no exceptional circumstances here, and petitioners do not attempt to present any. This is not even a case of a failure to raise a claim on appeal that was presented in the District Court or even in the pleadings—the due process claim alleged was never raised anywhere.

The reason it was not previously raised is obvious from the claim itself. Petitioners allege that the regulation creates irrebuttable presumptions that all recipients who receive duplicate rent payments have mismanaged their grants and that these duplicate payments remain available as a resource to meet current needs during the recoupment period. There are no such presumptions at all, much less any irrebuttable ones. The regulation is not limited solely to proven cases of mismanagement or to cases where duplicate payments remain available as a resource. The regulation means exactly what it says—if you request a double rent payment, you have to pay it back over the next six months. It can hardly be said that this is too vague or standardless for a welfare official to administrate. [See Pet. Brief, p. 19, n. 12.]

the pleadings to determine whether the constitutional claim raised therein is substantial. See e.g. *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 (1962); *Ex parte Poresky*, 290 U.S. 30, 32 (1933). The traditional test for determining substantiality, in the context of whether a three-judge court must be convened pursuant to 28 U.S.C. § 2281 or whether jurisdiction can be exercised over pendent claims, has been consistently adhered to by this Court. A question is insubstantial "either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy'." *Ex parte Poresky*, *supra*, 290 U.S. at 32. See *Goosby v. Osser*, 409 U.S. 512, 518 (1973); *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 105-106 (1933); *Hannis Distilling Co. v. Mayor and City Council of Baltimore*, 216 U.S. 285, 288 (1910).

This Court's recent decision in *Goosby v. Osser*, *supra*, did not change this test. Petitioners imply that now a claim is insubstantial only if prior decisions of this Court inescapably render the claims frivolous [Pet. Brief, pp. 22-23, 30]. However, *Goosby* arose in the context of the Circuit Court's finding a lack of jurisdiction because the claims raised were directly foreclosed by the facts of a specific case, namely *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969). It is only in *that* situation, "[I]n the context of the effect of prior decisions upon the substantiality of constitutional claims," *Goosby*, 409 U.S. at 518, that this Court held that these prior decisions must inescapably render the claims frivolous.¹⁰

¹⁰ The Court also specified that this standard applies "for the purposes of 28 U.S.C. § 2281". *Goosby*, 409 U.S. at 518. If any change was intended by this Court, it would be limited to such

The test for substantiality enunciated by this Court in *Ex parte Poresky*, *supra*, and cited with approval in *Goosby*, is not limited to finding prior Supreme Court cases directly on point in both factual and legal circumstances. That is but one aspect of the test. This Court has held in *Levering & Garrigues Co. v. Morrin*, *supra*, cited with approval in *Goosby*, that the test for substantiality is two-pronged. Either the constitutional claim is "obviously without merit" or it is foreclosed by prior Supreme Court decisions directly on point. *Cf. Bailey v. Patterson*, 360 U.S. 31 (1962) [Constitutional claim held valid on its face because of prior decisions; statute enjoined without the convening of a three-judge court]. In *Levering*, this Court specifically found a claim insubstantial "by an application of the second test" (prior decisions) and passed "without inquiry, the first of these tests" (obviously without merit). 289 U.S. at 105-106.

A constitutional claim can thus be "obviously without merit" for jurisdictional purposes without having to be foreclosed by a prior Supreme Court decision directly on point one way or the other. The word "obviously" has "cogent legal significance". *Goosby*, 409 U.S. at 518, and may well require the claim to border on the frivolous. See *Baker v. Carr*, 369 U.S. 186, 199 (1962). However, this determination can be made by an application of the principles of constitutional analysis set forth in prior Supreme

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three judge court situations—where Congress wished to remove any possibility that a single judge could paralyze a state statutory scheme. See *Swift & Co. v. Wickham*, 382 U.S. 111, 116-119 (1965). Where the question of substantiality arises in the context of the power to consider a pendent claim, the considerations for determining federal jurisdiction are the opposite—whether the federal courts should be allowed to rule on claims over which they would have no jurisdiction in the first instance. See *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). The three judge court rationale may well compel a more lenient definition of substantiality.

Court cases that need not be directly on point as to both law and facts.

Ex parte Poresky, supra, is a perfect example. There a constitutional attack was made on a Massachusetts law mandating compulsory automobile liability insurance. The district court declined to convene a three-judge court and dismissed the complaint for want of a substantial federal question. This Court upheld this finding of insubstantiality, holding that it was proper to dismiss the case "in view of the decisions of this Court bearing upon the constitutional authority of the State, acting in the interest of public safety, to enact the statute assailed." 290 U.S. at 32. It is thus clear that what precluded a finding of substantiality was not a prior case on point, but the application to the facts of the case at bar of a general principle concerning the broad discretion of a state under its police powers. Thus the plaintiff could not argue, among other claims, that he was denied equal protection because the compulsory insurance statute only applied to citizens of Massachusetts, since the State had sweeping powers to enact protective laws in the area of public safety.

This analysis applies directly to cases in the area of social welfare. This Court has consistently held that the states have a uniquely broad discretion in enacting legislation implementing their welfare programs. In the landmark case of *Dandridge v. Williams*, 397 U.S. 471 (1970), this Court set forth the broad equal protection standard to be applied in social welfare cases. It stated [397 U.S. at 485]:

"In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality', *Lindsley v. Natural Carbonic Gas Co.*, 229

U.S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical it may be and unscientific'. *Metropolis Theater Co. v. City of Chicago*, 228 U.S. 61, 69-70. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.'" *McGowan v. Maryland*, 366 U.S. 420, 426.

In upholding a Maryland maximum grant regulation that was challenged, as in the instant case, on the grounds that it discriminated against a certain class of children, 397 U.S. at 476, this Court refused to consider either the wisdom of the regulation or whether better alternatives could be devised. 397 U.S. at 487. Rather, this Court emphasized that [397 U.S. at 487]:

" . . . the intractable economic, social, and ever philosophical problems presented by public welfare assistance programs *are not the business of this Court.*"
(Emphasis added)

The Court thus accepted Maryland's rationale that a maximum grant system was a rational way to allocate funds to the needs of the largest possible number of families. It added [397 U.S. at 487]:

" . . . the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."

The analysis of *Dandridge* has been consistently reaffirmed. In *Jefferson v. Hackney*, 406 U.S. 535 (1972), this Court again emphasized the "broad discretion" [406 U.S. at 545] of states in the area of social welfare. It stated [406 U.S. at 546-547]:

"So long as its judgments are rational and not invidious, the legislature's efforts to tackle the prob-

lems of the poor and the needy are not subject to a constitutional straitjacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them."

Any considerations of whether the equal protection claim alleged in the instant case is substantial must thus be determined in the light of the exceptionally broad powers of states to make legislative classifications in the area of social welfare.¹¹ When the *Dandridge* standard of review is applied to the claim at bar, it is clear that it is "obviously without merit" so as to lack the substantiality necessary for federal jurisdiction.

B. Petitioners' Constitutional Claim is Insubstantial

Petitioners allege that the New York recoupment regulation creates two classes of needy children—those subject to recoupment because they received extra payments and those not subject to recoupment because they have not received extra payments. They claim that this classification is invidious because the children are classified on the basis of their parents' conduct [Pet. Brief, pp. 24-25]. However, petitioners misconceive the reality of the situation.

Petitioners have received an additional benefit over and above their statutory grant. They all are in the position of having misallocated the money given to them to pay their rent. Rather than the County Department allowing these people to be evicted, it has stepped in and paid the back rent to end the eviction proceedings. These people

¹¹ This liberal classification criterion is analogous to that granted the states in the area of taxation. See *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973). This Court has grouped together "the area of economics and social welfare" in establishing equal protection standards. *Dandridge*, 397 U.S. at 485.

have thus received a benefit greater than any other class of recipients, who have had to pay their full rent and then strictly allocate the remaining funds to fulfill their other needs. It is thus incontestably reasonable for petitioners, who have received and actually utilized greater monies than similarly situated recipients, and greater monies than to which they were entitled, to reimburse these monies to the Department.

Petitioners' claim of disparate treatment raising to the level of unconstitutionality is thus totally meritless. As the Court below stated [A 123]:

"By receiving the advance payment, plaintiffs have gotten more than the normal grant. Without the recoupment regulation, the plaintiffs would be in a preferred position over all the other welfare recipients who have paid their full rent out of the normal grant. *The purposes of equal protection are served by treating all alike without granting special favor to those who have misappropriated their rent allowance.*" (Emphasis added)

Petitioners are demanding to be treated *better than* similarly situated recipients. They cannot claim a denial of equal protection because the respondents desire to treat them the same as others so situated.

This situation was recognized by the court in *Acosta v. Swank*, 312 F. Supp. 765 (N.D. Ill. 1970), which summarily rejected an equal protection argument on an Illinois statute requiring recoupment of emergency payments necessitated by prior misallocation of regular payments.¹² The Court stated [312 F. Supp. at 767]:

¹² This opinion was withdrawn [318 F. Supp. 1348 (N.D. Ill. 1970)] because the Illinois regulation as to duplicate payments was changed as a result of negotiations between HEW and Illinois officials being conducted while the Court was hearing the case. On remand, the Court stated that plaintiffs failed to state a cause of action and that jurisdiction was lacking. 225 F. Supp. 1157.

"The only difference between the treatment accorded to plaintiffs by defendants from that given to other persons similarly situated is that plaintiffs have been given *preferred treatment* over the other persons so situated who have not needed emergency allotments." (Emphasis added)

See also *Snell v. Wyman*, 281 F. Supp. 853 (S.D.N.Y. 1968), *affd.* 393 U.S. 323 (1969) [Requirement of repayment to the State of recipient's disability benefits did not violate equal protection]; *Morgan v. Kennedy*, 331 F. Supp. 861 (D. Neb. 1971).

It is thus difficult to see how petitioners can even begin to make an equal protection argument as to their being treated differently from other AFDC families. To argue that children are being treated differently because of their parents' conduct is to beg the question. These same children received the benefit of the extra payment that similarly situated children did not receive; they therefore can be subjected to recoupment of that additional payment.

Moreover, this Court has never recognized any breakdown between the actions of parents and children in considering the legality of the level of AFDC grants by the states. The grant is to the family, and all problems of compliance relate to the family as a unit. Thus, in *Wyman v. James*, 400 U.S. 309 (1971), this Court held that the refusal of a mother with children to allow home visitation by the agency may result in the termination of benefits to the entire family. This Court noted that the choice was entirely up to the welfare mother, 400 U.S. at 324, and stated [400 U.S. at 325]:

"The only consequence of her refusal is that payment of benefits cease. Important and serious as this is, the situation is no different than if she had exercised a similar negative choice initially and refrained from applying for AFDC benefits."

In analogous situations, the federal courts have sustained the denial of AFDC benefits to families where the parent refused to assign deeds to real property or other assets to the agency, *Snell v. Wyman*, *supra*; *Charleston v. Wohlgemuth*, 332 F. Supp. 1175 (E.D. Pa. 1971), *aff'd* 405 U.S. 970 (1972), even where the Court specifically noted that "the refusal of aid to the parent means deprivation to the child." 332 F. Supp. at 1184. See also *New York State Department of Social Services v. Dublino*, — U.S. —, 41 U.S.L.W. 5047 (1973).

This analysis was most strikingly presented in *Dandridge v. Williams*, *supra*, where the plaintiffs argued that the state maximum grant regulation discriminated against children in large families. While noting that the effect of the regulation "is to reduce the per capita benefits to the children in the largest families" 397 U.S. at 477, what is really affected is the *family* grant. 397 U.S. at 477-478. This Court stated [397 U.S. at 479]:

"The very title of the program, the repeated references to families . . . and the words of the preamble quoted above, show that Congress wished to help children through the family structure."

It is thus clear that petitioners' assertion of invidious discrimination against children, as opposed to the entire family, is frivolous.¹³ In determining the level of assistance, the Courts look solely to the family grant. See also *Rosado v. Wyman*, 397 U.S. 397 (1970).

¹³ Petitioners' citation of *Levy v. Louisiana*, 391 U.S. 68 (1968), is inapposite. It has nothing to do with the entitlement to benefits of a family as a unit. The language quoted from that case by petitioners [Pet. Brief, p. 28] is a misquote. The Court actually stated that it is invidious to discriminate against children when their actions are not relevant to the harm suffered by the *mother*, not the children themselves. The actions of the mother certainly control the ultimate welfare of the children.

The issue thus presented in *Dandridge*, as in the instant case, was that given the state's finite resources, its choice was either to support some families adequately and others less adequately, or not to give sufficient support to any family. 397 U.S. at 479. This Court held that the state can sustain as many families as it can. In the case at bar, it is clear that New York cannot penalize recipients who properly manage their grants by expending double payments to those who do not. Given New York's finite resources, the result may well be a ratable reduction in everyone's grant [see A 123], or the alternative of having recipients evicted and thrown out on the street. The problem of recoupment of duplicate rent allowances is plainly one of the intractable problems of the welfare system that cannot be dealt with by putting the states in a constitutional straitjacket. *Jefferson v. Hackney*, *supra*, 406 U.S. at 546. It is obviously reasonable for New York to allocate its limited resources so that each family receives an equal share.

Petitioners further attack the rationality of New York's recoupment regulation by claiming that it both violates the goal of the Social Security Act, and is destructive of overriding state objectives because it does not place foremost the needs of the child [Pet. Brief, pp. 26-28]. In particular, they focus on the reasoning of the Court below that, in addition to the regulation being "reasonably designed to ensure that there are sufficient funds available to all recipients on the level set by the state legislature" [A 123], the regulation also encourages proper money management.¹⁴ Petitioners attack this as misconceiving the issue "by fastening upon but one element in a complex system of

¹⁴ As the Court below correctly pointed out, if there were not a recoupment provision, there would be a disincentive for welfare recipients to manage their grants so as to have funds available to pay their rent each month [A 123]. See 42 U.S.C. § 602(a)(14).

public welfare" [Pet. Brief, p. 27]. Yet, to make this argument is to answer it—for *Jefferson v. Hackney*, *supra*, reiterates the established principle in analyzing equal protection claims that [406 U.S. at 546]:

"A legislature may address a problem 'one step at a time', or even 'select one phase of one field and apply a remedy there, neglecting the others' . . ."

The rational basis test of *Dandridge* means that the regulation must have some rational relationship to a legitimate state objective. Cf. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 51 (1973).¹⁵ There are obviously many legitimate state objectives and some that ultimately may conflict with each other. Certainly the State has an interest in meeting the needs of children, but it also has a legitimate interest in allocating its limited resources so that all recipients are treated equally and so that mismanagement is discouraged. The teaching of *Dandridge* is that the State will not be compelled to pick and choose among these objectives.¹⁶

This was made clear in the recent case of *McGinnis v. Royster*, 410 U.S. 263 (1973), where this Court upheld a New York statutory distinction in the awarding of good behavior time in state prisons even though the rationale supporting the legislative classification was not supportive of the primary aim of the statute. This Court stated [410

¹⁵ Petitioners' expectation that a more modified equal protection test may apply [Pet. Brief, p. 32] has been put to rest by the *San Antonio School District* decision.

¹⁶ As petitioners have pointed out [Pet. Brief, p. 30], the New York courts have been responsive to true emergency situations by supplying a supplementary remedy where necessary. See also *Matter of Howard v. Wyman*, 28 N.Y. 2d 434, 322 N.Y.S. 2d 683, 686, fn. 3 (1971).

U.S. at 276]:

"... our decisions do not authorize courts to pick and choose among legitimate legislative aims to determine which is primary and which subordinate. Rather, legislative solutions must be respected if the 'distinctions drawn have some basis in practical experience,' *South Carolina v. Katzenbach*, 383 U.S. 301, 331 (1966), or if some legitimate state interest is advanced, *Dandridge v. Williams*, 397 U.S. 471, 486 (1970). So long as the state purpose upholding a statutory class is legitimate and nonillusory, its lack of primacy is not disqualifying."

This language applies directly to the case at bar. Given the complexities of public welfare that even petitioners recognize, the State must have the broadest discretion to choose among its goals, and the courts will not decide whether these goals are wise or whether they best fulfill the social and economic objectives that New York might ideally espouse. *Dandridge*, 397 U.S. at 487. See also *San Antonio School District v. Rodriguez, supra*, 411 U.S. at 42, 50-51.

It is thus clear that, upon application of the equal protection standard of *Dandridge*, petitioners' claim is frivolous. If a classification has any rational basis that supports any legitimate state interest, it must be sustained. In the area of social welfare, the States have especially broad discretion in making statutory distinctions, and these distinctions can be legitimately made in the AFDC program on the basis of the family grant itself. Given these principles, it requires little judicial effort to find the equal protection claim "obviously without merit", for on the face of the statute, even aside from any goals of deterring mismanagement, the rent recoupment regulation is designed to treat all welfare recipients equally by recouping monies from certain recipients who actually received

payments to which they were not entitled in the first place.¹⁷

Petitioners claim that this disposition below was actually on the merits rather than being a determination of threshold jurisdiction. However, it is plain that some discussion of the merits is necessary to find a claim obviously without any merit. A determination of threshold jurisdiction may preclude the introduction of evidence, *cf. Carter v. Stanton*, 405 U.S. 669 (1972), but it certainly cannot foreclose argument. Indeed, a finding of lack of substantiality must of necessity be a finding on the merits—that there is no merit whatever. In considering the broad standards applicable to equal protection claims, especially in the area of social welfare, the federal courts have often made such findings of jurisdictional insufficiency.

Thus, in *Money v. Swank*, 432 F. 2d 1140 (7th Cir. 1970), the Seventh Circuit considered an equal protection chal-

¹⁷ Petitioners attempt to show that their equal protection argument is substantial by indicating that three-judge courts have been convened in other Circuits in considering similar statutes. However, the constitutional arguments made in those cases were not the same as that made in the instant case. In *Acosta v. Swank*, *supra*, the plaintiff challenged the state's not requiring recoupment to recipients receiving emergency assistance within 90 days of the initial grant, but requiring such recoupment thereafter; in *Cooper v. Laupheimer*, 316 F. Supp. 264 (E.D. Pa. 1970), the plaintiff, in addition to due process and equal protection claims, raised a Fifth Amendment claim of self-incrimination because of the possibility of criminal penalties resulting from an admission to having endorsed over a welfare check; in *Holloway v. Parkham*, 340 F. Supp. 336 (N.D. Ga. 1972), the plaintiff raised due process claims in addition to the equal protection claim; in *Bradford v. Juras*, 331 F. Supp. 167 (D. Ore. 1971), the reported opinion does not indicate the constitutional claims raised.

Not one of these cases considered this Court's opinion in *Dandridge v. Williams*, *supra*, and all were decided before *Jefferson v. Hackney*, *supra*. Indeed, only one of these cases ever reached the merits of the constitutional claim similar to the one at issue, and that court summarily rejected that equal protection claim as frivolous. *Acosta v. Swank*, *supra*.

lenge to an Illinois regulation making distinctions in educational allowances between academic and vocational programs for welfare recipients. The court looked to the standards of *Dandridge*—that the states have great latitude in dispensing available funds and that any reasonable legislative objective can support the classification regardless of the wisdom of the choice. 432 F. 2d at 1143. The Court then found that no substantial constitutional question was presented, citing the need for vocational education and the limited state funds available, and refused to convene a three-judge court. Similarly, in *Aguayo v. Richardson*, 473 F. 2d 1090 (2d Cir. 1973), the Second Circuit held that the application of the *Dandridge* "standard of review" precluded a finding of jurisdictional substantiality as to the equal protection claim made therein that a welfare work program only applied in a limited number of districts. 473 F. 2d at 1109. See also *Waier v. Schmidt*, 318 F. Supp. 22 (E.D. Wis. 1970).

Equal protection claims in non-welfare areas have also been treated by the federal courts' applying the broad rational basis standard in dismissing for want of a substantial federal question. See *Lindauer v. Oklahoma City Urban Renewal Authority*, 452 F. 2d 117 (10th Cir. 1971), *cert. den.* 405 U.S. 1017, *reh. den.* 406 U.S. 911 (1972); *Smith v. Follette*, 445 F. 2d 955, 959 (2d Cir. 1971); *White v. Gates*, 253 F. 2d 868 (D.C. Cir. 1958), *cert. den.* 356 U.S. 973 (1958); *Hanley v. Volpe*, 305 F. Supp. 977, 981-982 (E.D. Wis. 1969); *American Commuters Association v. Levitt*, 279 F. Supp. 40 (S.D.N.Y. 1967), *aff'd* 405 F. 2d 1148 (2d Cir. 1969).

All of these cases involved decisions on the "merits" to the extent that the merits had to be discussed before a finding of jurisdictional insubstantiality was made. However, the federal court in each of these cases implicitly based its finding of insubstantiality on the difficulty of alleging arguable equal protection claims in the light of the broad

discretion given the states to make classifications that can withstand equal protection scrutiny. When petitioners in the instant case come into federal court and claim that they are denied equal protection because they are not allowed to keep double payments to which they are not entitled and which no other recipients have received, it is easy to see how their claim cannot reach the jurisdictional level.

Since there was no substantial constitutional claim, there is no basis for jurisdiction under 28 U.S.C. § 1343(3). The Court of Appeals thus correctly determined that it had no pendent jurisdiction over the statutory claims raised. See *Rosado v. Wyman*, *supra*, 397 U.S. at 403 (1970); *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

POINT II

Absent a substantial constitutional question, the federal courts do not have jurisdiction under 28 U.S.C. §§ 1343(3) and (4) of a claim alleging a violation of the Social Security Act.

Petitioners claim that even if the federal courts did not have jurisdiction of the statutory claims as pendent to a substantial constitutional claim, there is federal jurisdiction based upon the statutory claims themselves. They assert that a claim based upon the AFDC welfare provisions of the Social Security Act, which confer no federal jurisdiction by the terms of the Act, can still be heard pursuant to 42 U.S.C. § 1983 because § 1983 is an Act of Congress providing for equal rights or civil rights under sections 1343(3) and (4) of Title 28, and because claims brought under the Social Security Act are rights secured by § 1983. It is respectfully submitted that this argument has no basis in the history of these provisions, the intent of Congress, or the decisions of the courts.

A. Section 1983 Does Not Provide a Remedy for the Deprivation of Any "Rights" Secured by the Social Security Act.

In order for petitioners to allege a claim under § 1983, they must first establish that their claim of the alleged statutory non-conformity of the State regulation with the Social Security Act is one of the "rights, privileges or immunities secured by the Constitution and laws" under § 1983. To do this, they must show that the language "and laws" includes particular provisions of the Social Security Act. The history of § 1983 belies any such interpretation.

The original source of § 1983 is section 1 of the Civil Rights Act of 1871, also known as the Ku Klux Act of April 20, 1871 [17 Stat 13]. It stated:

"That any person who, under color of any law . . . of any State, shall subject . . . any person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall . . . be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress. . . ."

Section 1 then went on to provide jurisdiction for these proceedings as follows:

". . . such proceeding to be prosecuted in the several district and circuit courts of the United States . . . under the provisions of [the Civil Rights Act of 1866]."¹⁸

¹⁸ The Civil Rights Act of 1866 [14 Stat 27] was the predecessor of 42 U.S.C. §§ 1981 and 1982—mandating that the legal and property rights of all citizens must be the same as those granted to white citizens [14 Stat 27, § 1]. Section 2 of said act provided criminal penalties for depriving any person of rights protected by the Act. Section 3 provided jurisdiction as follows:

"That the district courts of the United States . . . shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured by the first section of this act. . . ."

The Act became positive law in 1874 [Revision of Statutes Act of 1874, ch. 333, § 2, 18 Stat 113 (1875)] as part of the Revised Statutes [Rev. Stat. § 563(12), 629(16), 1979 (1875)] and is now codified in two separate sections—42 U.S.C. § 1983 (creating the cause of action) and 28 U.S.C. § 1343 (providing the jurisdiction).

The basic problem presented by § 1983 is that its language as codified in Rev. Stat. 1979 is different from that set forth in section 1 of 17 Stat 13. The original act created a cause of action for the deprivation of rights "secured by the Constitution of the United States"; R.S. 1979 created a cause of action for the deprivation of rights "secured by the Constitution and laws." While the Revised Statutes are positive law that supersede previous Statutes at Large, there is no explanation as to the scope of the phrase "and laws" or as to even why it suddenly appeared.¹⁹ Congress did not appear to be troubled by this addition, and appears to have accepted the new language merely as a consolidation of the former statutes. See 2 Cong. Rec. 825-28 (1874).

It would seem that this language was deemed necessary to assure the existence of a federal remedy for the deprivation of rights secured by the Civil Rights Acts of 1866 and 1870 [14 Stat 27 (1866); 16 Stat 140 (1870)]. The Civil Rights Acts of 1866, 1870 and 1871 all originally contained their own jurisdictional provisions. When these statutes were revised and codified in 1875, the jurisdictional provisions were separated out. Sections 1971, 1981 and 1982

¹⁹ The Revised Statutes were drafted by a three-man Commission appointed by Congress in 1866 "to revise, simplify, arrange, and consolidate all statutes of the United States." Revision of Statutes Act of 1866, ch. 140, § 1, 14 Stat 74 (1866). They were instructed to make only those changes essential to the reorganization of the Statutes at Large and consistent with the purpose of the original law. *Id.*, 14 Stat 75 ["making such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the original texts"].

of Title 42 are the modern counterparts of the substantive sections, while section 1343 of Title 28 is the counterpart of the jurisdictional section. Section 1343 provides jurisdiction only for those actions "authorized by law". Therefore, by including the words "and laws" in section 1983, the revisers were assuring that actions brought pursuant to the substantive sections of the Civil Rights Acts of 1866 and 1870 were "authorized by law" within the meaning of section 1343 so as to be heard in the federal courts. See Note, "Federal Jurisdiction Over Challenges to State Welfare Programs", 72 Columbia Law Review 1404, 1418 (1972).

This analysis becomes clear when the purpose of the Civil Rights Act of 1871 is considered. The legislative history of this Act is set forth in detail in *Monroe v. Pape*, 365 U.S. 167 (1961). There can be no doubt that the expressed purpose of the Act was to exercise the power vested in Congress by section 5 of the Fourteenth Amendment to enforce that Amendment. 365 U.S. at 171. See also *Lynch v. Household Finance Corp.*, 405 U.S. 538, 545 (1972). The legislative history further reveals that while the debates were geared to the problems created by the activities of the Ku Klux Klan, there was still concern about other civil rights, including property rights, that were protected by the Fourteenth Amendment. See *Lynch v. Household Finance Corp. supra*. However, there is no indication whatever that Congress intended that the entire panoply of federal laws in every conceivable area could be enforced through section 1983, in the absence of any constitutional claim, simply because some state action may be involved. See Cong. Globe, 42d Cong., 1st Sess. (1871). See also *Monroe v. Pape, supra*, 365 U.S. at 173-180.

This Court has recently spoken of section 1983 specifically in terms of the protection of constitutional rights. Thus in *Mitchum v. Foster*, 407 U.S. 225, 242 (1972), this Court referred to the "very purpose" of § 1983 being "to protect the people from unconstitutional actions under

color of state law". See also *Moor v. County of Alameda*, 411 U.S. 693, 699 (1973). In *Adickes v. Kress & Co.*, 398 U.S. 144, 150 (1970), the Court noted that to allege a cause of action under § 1983 required proof that a defendant deprived him of a right secured by the "Constitution and laws" and that the plaintiff must show that the defendant deprived him of "*this constitutional right*" (emphasis added). While the Court in these cases mentioned that rights secured by federal law were included under § 1983, there is no indication that these "laws" were anything other than laws enforcing the Thirteenth, Fourteenth or Fifteenth Amendments.²⁰ See *United States v. Price*, 383 U.S. 787, 797 (1966) [holding that the criminal analog to § 1983 secured all constitutional rights so as to include all rights secured by the Fourteenth Amendment]. Cf. *Greenwood v. Peacock*, 384 U.S. 808, 829-30 (1966) [dicta]. See *Monroe v. Pape*, *supra*, 365 U.S. at 212-213 (opinion of FRANKFURTER, J.); *Adickes v. Kress & Co.*, *supra*, 398 U.S. at 203-204 (opinion of BRENNAN, J.).

Indeed, the only time this Court squarely faced the issue of whether section 1983 applied to statutory rights other than those secured by the Fourteenth Amendment, it held that it did not. *Holt v. Indiana Manufacturing Co.*, 176 U.S. 68 (1900) [suit claiming the deprivation of a right secured by the patent laws of the United States—holding that the predecessor of 1983 referred to civil rights only]. None of the few lower court cases that have applied § 1983 to non-civil rights statutory claims ever considered the background of this statute, as each applied § 1983 without any explanation. Cf. *Bomar v. Keyes*, 162 F. 2d 136 (2d

²⁰ Petitioners suggest that the "privileges and immunities" clause of the Fourteenth Amendment should be resurrected as incorporating all federal laws within the protection of that Amendment. This Court rejected such an interpretation long ago, see *The Slaughterhouse Cases*, 16 Wall. 36 (1872), and has adhered to that position. See *Hague v. Congress of Industrial Organizations*, 307 U.S. 496, 519-521 (1939) [Opinion of STONE, J.].

Cir. 1947), *cert. den.* 332 U.S. 825 (1947); *Gomez v. Florida State Employment Service*, 417 F. 2d 569 (5th Cir. 1969). The one federal court that has considered § 1983 in the light of its legislative history has ruled that § 1983 does not encompass claims arising under the Social Security Act. *Wynn v. Indiana State Department of Public Welfare*, 316 F. Supp. 324 (N.D. Ind. 1970). This Court has in the past declined to decide whether the federal courts have jurisdiction of suits brought under § 1983 alleging violations of the Social Security Act. *King v. Smith*, 392 U.S. 309, 312, n. 3 (1968); *Rosado v. Wyman*, *supra*, 397 U.S. at 405, n. 7.¹¹

In the light of the legislative history of § 1983, it is clear that it cannot be interpreted as petitioners claim it should be. Congress in 1871 obviously never contemplated the intricacies of a federally-funded and state-enforced social welfare system. This Court has previously looked to the lack of any expression of congressional intent under the 1871 Act in holding that it is not as broad as its language can be read. In *Tenney v. Brandhove*, 341 U.S. 367 (1951), this Court was faced with a suit under the predecessor of § 1983 against a member of a state legislature. The defense raised was the common law defense of legislative privilege. This Court assumed that Congress may have had the power to limit legislative freedom, but refused to rule that the broad language of the predecessor of § 1983 could apply. The Court stated [341 U.S. at 376]:

"But we would have to make an even rasher assumption to find that Congress thought it had exercised the power. These are difficulties we cannot hurdle. The limits of §§ 1 and 2 of the 1871 statute . . . were not

¹¹ In all of the cases where this Court considered statutory claims under the Social Security Act, federal jurisdiction was obtained pendent to substantial constitutional claims. *Rosado v. Wyman*, *supra*; *King v. Smith*, *supra*. There was thus no need for this Court to determine whether statutory claims were properly alleged as arising under § 1983.

spelled out in debate. We cannot believe that Congress—itsself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us.”

See also *Pierson v. Ray*, 386 U.S. 547 (1967). Similarly, it cannot be assumed that Congress in 1871 covertly included in the general language of § 1983 suits brought under an Act that provides for the distribution of federal funds to state-run welfare programs—an area whose complexities were never even remotely envisioned a century ago.²²

B. Section 1343(3) Does Not Provide Federal Jurisdiction For Claims Under § 1983 Alleging Violations of the Social Security Act.

Assuming *arguendo* that Congress created a cause of action under § 1983 for allegations of violations of the Social Security Act, it is clear that Congress did not intend that the federal courts have jurisdiction to hear these cases in every instance regardless of the jurisdictional amount involved. *Cf.* 28 U.S.C. § 1331. In keeping with the concern of Congress to protect the rights of all citizens under the Thirteenth, Fourteenth and Fifteenth Amendments, the language of 28 U.S.C. § 1343(3) could not be more specific

²² It is doubtful that the Social Security Act “secures” any rights to petitioners to initially come under § 1983 even if “laws” were given a broader interpretation. Certainly, petitioners have no right to any benefits at all, as the states are not obligated to participate in the AFDC program. *King v. Smith, supra*, 392 U.S. at 316. The entire AFDC program is formulated in terms of compliance by the individual State—administrative hearings allow only the States to be parties, and the sole remedy provided by statute is a cut-off of federal funds to the State. 42 U.S.C. § 604. Rights are “secured” to individual recipients only to the extent that the States decide to comply with the program. The AFDC program does not secure rights to the recipients themselves. See *Oklahoma v. Civil Service Commission*, 330 U.S. 127, 143 (1947).

—the District Courts have jurisdiction of actions to redress the deprivation under color of state law of any right “secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens . . .” (emphasis added). Neither the Social Security Act nor § 1983 is such an act.

As noted, *supra*, page 29, the jurisdictional provision of the Civil Rights Act of 1871 referred to the Civil Rights Act of 1866 [14 Stat 27], which granted concurrent jurisdiction to the district courts and the circuit courts to consider the specific equal rights provisions of that Act that enforced the Thirteenth Amendment. See *Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409, 412 (1968). The 1871 Act enforced the Fourteenth Amendment. Therefore, when the three-man revision commission compiled the Revised Statutes in 1874, it separated the jurisdictional provisions from the other provisions of these Acts and set forth the jurisdiction of all these Acts together in one set of statutes. The district court statute provided jurisdiction to redress deprivation of “any right secured by any law of the United States” [Rev. Stat. § 563(12)], while the circuit court statute provided jurisdiction to redress deprivation of “any right secured by any law providing for the equal rights of citizens” [Rev. Stat. § 629(16)]. See *Lynch v. Household Finance Corp.*, *supra*, 405 U.S. at 543-44, n. 7.

There is no explanation in the Revised Statutes as to why this distinction was made. Petitioners point to the margin notes to both sections and to the cross references to both §§ 1977 and 1979 of the Revised Statutes [now 42 U.S.C. §§ 1981 and 1983] and argue that the revisers intended that both § 629(12) and § 563(12) have the same breadth [Pet. Brief, p. 51]. If that is correct, then it seems clear that both statutes were intended to be limited to the specific language of the circuit court provision.

The language of the circuit court provision was no accident, and its formulation sheds much light on the actual

intent of Congress in providing jurisdiction under the Civil Rights Act. See in general, Note, Columbia L. Rev., *supra* at pp. 1422-23. The circuit court provision in a preliminary draft was accompanied by a lengthy draftsman's note which was concerned primarily with the construction of section 3 of the Civil Rights Act of 1866—the section that provided the jurisdiction for the 1871 Civil Rights Act. See p. 29, *supra*. Section 3, on its face, could possibly be interpreted as granting to the federal courts jurisdiction over *all* causes of action brought by persons who have been deprived of the enumerated civil rights of section 1 of that Act, regardless of whether the cause of action had any relation to the deprivation of the civil right enumerated. The draftsman observed [1 Revision of U.S. Stat. Title 13 (1872 draft) at 63]:

“it can hardly be supposed that Congress designed, not only to open the doors of the circuit courts to these parties without reference to the ordinary conditions of citizenship and amount in dispute, but, in their behalf, to convert the district courts into courts of general common law and equity jurisdiction.”

In order to avoid these “consequences which Congress cannot be supposed to have intended” [*Id.*, p. 63], the draftsmen concluded that section 3 must be construed as providing a remedy only for actions directly arising out of the deprivation of rights protected by the 1866 and 1870 Civil Rights Acts. Note, Columbia L. Rev., *supra*, at p. 1422.

The draftsman additionally noted that the Civil Rights Act of 1871 was framed to express this intention more definitely [*Id.*, p. 64]—because it creates a cause of action for the deprivation of rights “secured by the Constitution of the United States”. Therefore, the “equal rights” language was added for the following reason [*Id.*, p. 64]:

“It may have been the intention of Congress to provide, by [the 1871 Act] for all the cases of deprivations mentioned in the previous act of 1870, and thus

actually to supersede the indefinite provisions contained in that act. But as it might perhaps be held that only such rights as are specifically secured by the Constitution, and not every right secured by a law authorized by the Constitution, were here intended, it is deemed safer to add a reference to the civil rights act."

It is thus clear that section 629(16) of the Revised Statutes conferred jurisdiction on the circuit courts solely over actions to redress the deprivation of rights secured by the Civil Rights Acts passed pursuant to the enforcement clauses of the Thirteenth, Fourteenth and Fifteenth Amendments. Note, *Columbia L. Rev.*, *supra*, at p. 1422.

In the light of this history of the circuit court provision, it does not appear that the district court provision, referring to "any right received by any law of the United States" [Rev. Stat 563(12)], can be taken literally—especially if the jurisdiction of the two courts was to be concurrent. There is no explanation for this district court language and it may just be careless drafting. See Note, *Columbia L. Rev.*, *supra*, at p. 1423, n. 147.

This becomes clearer in 1911, when the two jurisdictional provisions were merged into what is now section 1343(3) [36 Stat 1092]. Congress specifically chose the equal rights language of the circuit court provision. Indeed, the Senate Report accompanying the Judiciary Act of 1911 referred to the vesting of jurisdiction in the district court as a merging of the former circuit court and district court provisions. S. Rep. No. 388, pt. 1, 61st Cong., 2d Sess. 15 (1910). This implies that the scope of the former district court provision was, despite its broad language, originally intended to apply solely to jurisdiction over equal rights cases. Indeed, the explicit choice of the equal rights limitation in 1911 shows that Congress believed that the "and laws" addition to section 1983 was also limited to equal

rights laws"²¹ [see Point II A, *supra*]. Certainly Congress had knowledge of the most recent definitive Supreme Court decision of that day that had explicitly so limited the scope of the Civil Rights Act. *Holt v. Indiana Manufacturing Co.*, *supra*. See also Note, Columbia L. Rev., *supra*, at p. 1423, n. 152.²²

This Court's decision in *Georgia v. Rachel*, 384 U.S. 780 (1966) is especially significant. There the question concerned the scope of the federal removal statute, 28 U.S.C. § 1443, which referred to "any law providing for equal rights". This Court stated [384 U.S. at 792]:

" 'When the removal statute speaks of "any law providing for equal rights," it refers to those laws that are couched in terms of equality, such as the historic and the recent equal rights statutes, as distinguished from laws, of which the due process clause and 42 U.S.C. § 1983 are sufficient examples, that confer equal rights in the sense, vital to our way of life, of bestowing them upon all.' " (Emphasis added)

See *New York v. Galamison*, 342 F. 2d 255, 269, 271 (2d Cir. 1965), *cert. den.* 380 U.S. 977 (1965). Cf. *Greenwood v. Peacock*, *supra*, 384 U.S. at 825. It would be incredible to believe that Congress intended this language in its 1874 removal statute based on the Civil Rights Act of 1866 to have a different meaning from the identical language in

²¹ Petitioners argue from both sides of the fence to suit their purposes. When they consider the revisers' addition of "and laws" to the 1871 Civil Rights Act during the 1874 codification, they attach momentous significance to a change that they claim has no legislative history to explain it. However, when they consider a similarly unexplained addition of "equal rights" in the codification of laws in 1911, they allege that it has no significance at all.

²² The only alternative explanation, of course, would be that Congress consciously chose to narrow the jurisdiction of the district courts to equal rights claims. See Note, "The Proper Scope of the Civil Rights Acts", 66 Harvard Law Review, 1285, 1293 (1953).

the predecessor of section 1343(3) [Rev. Stat. § 629(16)] at the time this latter section was enacted into positive law the same year. *Cf. McGuire v. Amrein*, 101 F. Supp. 414, 419 (D. Md. 1951) [holding section 1343 to be intended to secure civil rights granted by the Thirteenth, Fourteenth and Fifteenth Amendments].

Petitioners attempt to distinguish *Georgia v. Rachel* by noting that the removal statute was an outgrowth of the Thirteenth Amendment and that the Civil Rights Act of 1871 was an outgrowth of the Fourteenth Amendment, which reaches deprivations beyond those cast in racial terms [Pet. Brief, p. 55]. However, this argument only adds more support to respondents' interpretation of section 1343(3). Congress specifically gave the federal courts jurisdiction of rights "secured by the Constitution"—so as to encompass all Fourteenth Amendment rights. However, Congress very strictly limited the jurisdiction of the federal courts as to statutory rights, as opposed to constitutional rights, to "any Act of Congress providing for equal rights".

The only case that has brought non-civil rights act cases within section 1343(3) is *Bomar v. Keyes*, *supra*, where the Second Circuit found a cause of action under section 1983 by an allegation of improper dismissal of a teacher because of jury duty. However, the Court never mentioned section 1343 and seems to have proceeded with the erroneous assumption that section 1983 itself conferred jurisdiction. *Cf. Lynch v. Household Finance Corp.*, *supra*; *Mattingly v. Elias*, 325 F. Supp. 1374, 1383 (E.D. Pa. 1971). This decision has not been followed in the Second Circuit, which has now ruled that jurisdiction under section 1343(3) requires a deprivation of rights secured by a law providing for equal rights, and that the Social Security Act is clearly not such a law. *Almenares v. Wyman*, 453 F. 2d 1075, 1082, fn. 9 (2d Cir. 1971), *cert. den.* 405 U.S. 944 (1972); *McCall v. Shapiro*, 416 F. 2d 246

(2d Cir. 1969). Accord: *Serritella v. Engelman*, 339 F. Supp. 738, 746, fn. 19 (D. N.J. 1972), *aff'd* 462 F. 2d 601 (3rd Cir. 1972); *Acosta v. Swank*, 325 F. Supp. 1157, 1161 (N.D. Ill. 1971); *Mattingly v. Elias*, *supra*, 325 F. Supp. at 1383.

Faced with this unimpeachable historical evidence, petitioners have shifted their entire argument in their brief on the merits in this Court. Evidently conceding the invalidity of their original argument—made in the Second Circuit and in their petition for certiorari—that the Social Security Act was an Act of Congress providing for equal rights, they now claim that section 1983 itself is such an act. This is just a “bootstraps” argument that has no basis in reality.

Section 1983 creates a cause of action. It provides that when a person is deprived of rights protected and enumerated *elsewhere*, such as the Constitution and Acts of Congress enforcing these constitutional rights, he can sue in federal court. Section 1983 is a procedural statute, not a substantive statute. In terms of § 1343, § 1983 is the “civil action authorized by law to be commenced”; it is not the act providing for the protection of equal rights.

What petitioners have done is constructed a purely verbal argument that has no basis in the legislative history of section 1983 or section 1343. As has been shown, the intention of Congress in passing these statutes was to redress rights secured by the Thirteenth, Fourteenth and Fifteenth Amendments, not to open up the federal courts to every possible cause of action merely because it arises under color of state law. The limiting language of section 1343(3) has cogent legal significance. Indeed, if Congress had intended that section 1983 be an “Act of Congress providing for equal rights”, then it would mean that the addition of the language “and laws” in section 1983 must also be limited to laws protecting equal rights—otherwise section 1983 would be too broad a statute as to come

under the limits of section 1343(3).²² If this is so, then section 1983 would not encompass the Social Security Act, and petitioners would be out of court on that ground alone [see Point II A, *supra*].

Petitioners argue that section 1983 was passed to provide a federal remedy for those unable to obtain relief from the state courts [Pet. Brief, p. 55]. Yet, this would be the very reason that Congress would provide a gap between the cause of action of § 1983 and federal jurisdiction under § 1343(3) [presupposing that there is such a gap only if "and laws" is given a broad interpretation]. In *Monroe v. Pape*, *supra*, this Court listed three objectives underlying the 1871 Civil Rights Act: (1) to override state laws discriminating against blacks; (2) to provide a federal remedy where state law was inadequate; and (3) to provide a federal remedy where the state remedy, though available in theory, was not available in practice. 365 U.S. at 173-174. The purpose of the Civil Rights Act jurisdiction would be to provide a federal forum for the adjudication of those federal statutory rights that might evoke discriminatory treatment on the part of the state courts. It would thus be highly significant that Congress, in providing a forum for constitutional claims, would then limit the jurisdiction of the federal courts as to statutory claims to equal rights cases.²³

²² One of the primary principals of statutory construction is that the language of a specific statute controls over the language of a general statute. *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961). On this principle alone, the language of section 1343(3) would prevail over the language of section 1983.

²³ Section 1983 on its face does not specify the forum in which the action could be brought, and there is nothing to prevent 1983 claims from being brought in courts of general jurisdiction in the state courts. See *Dyer v. Kazuhisa Abe*, 138 F. Supp. 220, 228 (D. Hawaii 1956), *reversed on other grounds*, 256 F. 2d 728 (9th Cir. 1958). In this regard, it must be noted that the New York state courts have consistently considered and determined the very federal conformity problems raised by the instant case. See *Matter of Griffith v. Wyman*, 39 A D 2d 874, 333 N.Y.S. 2d 703 (1st Dept. 1972).

It is thus clear that there is nothing in the history of section 1343(3) to provide jurisdiction for an action brought pursuant to the Social Security Act. There is no reason to believe that Congress intended to create special federal jurisdiction pursuant to a statute that, far from creating specially protected rights, merely sets forth procedures for the distribution of federal funds that the states are not even legally obligated to accept for distribution. *King v. Smith, supra*. Petitioners have not cited a single case that holds that section 1343(3) creates federal court jurisdiction of a claim arising under the Social Security Act.

C. Section 1343(4) Does Not Provide Federal Jurisdiction For Claims Under § 1983 Alleging Violations of the Social Security Act.

Unable to obtain jurisdiction under the narrow jurisdictional provisions of section 1343(3), petitioners seize as their major argument the language referring to "civil rights" of section 1343(4) and claim that it provides a federal forum for all cases arising under the Social Security Act. They cite much language as to the "broad and sweeping" protection of "civil rights" created by the Civil Rights Act of 1866, see *Lynch v. Household Finance Corp., supra*, 405 U.S. at 543-44, and quote many sources dealing with the purpose of the 1871 Act to protect constitutional rights [Pet. Brief, p. 39]. They then interpolate this language as applying to all "civil rights" and conclude that the right to receive AFDC grants is such a "civil right" [Pet. Brief, p. 39].²⁷ Finally, petitioners conclude that sec-

²⁷ No court has ever held that the system for distribution of federal welfare funds to the states under the Social Security Act creates "civil rights". The courts have referred to rights protected by the Constitution as civil rights. See *Monroe v. Pape, supra*; *Baker v. Carr, supra*, 369 U.S. at 200, n. 19; *Lynch v. Household Finance Corp., supra*. Under the interpretation offered by petitioners, the jurisdictional limitation set forth by 28 U.S.C. § 1331 would become meaningless, for any federal "right" that can be asserted in a cause of action would become a "civil right" and thus cognizable in federal court without any monetary limit.

tion 1983 itself is an "Act of Congress providing for the protection of civil rights, including the right to vote" and that therefore any claim arising pursuant to section 1983, including any welfare claim, can be brought under section 1343(4).

This argument has a certain linguistic appeal, but it runs into one major problem—Congress never intended section 1343(4) to mean anything of the sort. Indeed, when one examines the legislative history behind the enactment of this provision in 1957, which is one of the first times Congress debated the scope of the Civil Rights Acts since the Reconstruction Era, it becomes clear that petitioners' claim of 1343(4) jurisdiction in the instant case borders on the ludicrous.

Section 1343(4) first appeared in the proposed bill before the House that was to become known as the Civil Rights Act of 1957.²⁸ The primary thrust of this bill was to protect voting rights of blacks in the South. The bill as reported out of the House Judiciary Committee had four parts. Part I established a Commission on Civil Rights whose duties were to investigate allegations concerning deprivations of the right to vote and to collect information as to factual and legal developments regarding denials of equal protection; Part II provided for an additional Assistant Attorney General who would become the head of a newly-formed Civil Rights Division in the Justice Department; Part III provided that the Attorney General would be empowered to institute a civil action under section 1985, the civil rights conspiracy section concerning the right to vote and other areas; Part IV provided similar powers to the Attorney General, specifically to enforce the right to vote under section 1971. See U.S. Code Cong. & Adm. News, H. Rept. 291, 85th Cong., 1st Sess. 1966 (1957). The language which is now § 1343(4) appeared in Part III.

²⁸ H.R. 6127 was enacted as the Civil Rights Act of 1957, 71 Stat. 634, P.L. 85-315.

In the General Statement setting forth the purpose of the bill, the House Report made it clear that the scope of the bill was limited to the civil implementation of the Thirteenth, Fourteenth and Fifteenth Amendments. The Report states [U.S. Code Cong. & Adm. News at 1970]:

"The proposal does not extend nor increase the area of civil rights jurisdiction in which the Federal Government is entitled to act. Those rights are presently protected by constitutional amendment and when violations occur they are subject to Federal prosecution. The provisions of the legislation, in fact, merely substitute civil proceedings for criminal proceedings in the already established field."

In discussing Part III of the bill, the implementation of section 1985 containing the present language of 1343(4), the report made clear that it did not expand rights presently protected [*Id.*, at p. 1976]:

"Section 122 amends section 1343 of Title 28, United States Code.

These amendments are merely technical amendments to the Judicial Code so as to conform it with amendments made to existing law by the preceding section of the bill. The first part of the proposal amends the catch line of a section, and the other section adds a new paragraph setting forth the jurisdiction of the courts. (Emphasis added)

It is difficult to conceive how "technical amendments" specifically designed to give limited powers to the Attorney General under 42 U.S.C. § 1985 in the area of voting rights suddenly can be made to create jurisdiction under section 1983 for rights secured by every federal statute in existence. This Court has held, contrary to petitioners' assertion [Pet. Brief, p. 42], that great weight is to be given to the interpretations of bills as set forth in the committee reports. *Duplex Printing Press Co. v. Deering*, 254 U.S.

443, 474-75 (1921); *United States v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 247 U.S. 310, 318 (1918). Petitioners, however, claim that Congress did not mean what it explicitly said, and attempt to show through a rather tortured linguistic analysis that Congress was greatly expanding the jurisdiction of the federal courts to hear every conceivable federal claim. Nothing could be further from the truth.

When the bill was initially introduced into the House for debate, it was explained to the House in great detail by Representatives Kenneth Keating and Peter Rodino [103 Cong. Rec. 8496-8498; 8498-8500]. Neither even mentioned the jurisdictional provision of 1343. It thus certainly cannot have been considered to be as revolutionary as petitioners claim it to be. This was made abundantly clear during the course of the debate in an exchange involving an amendment proposed by Representative Bruce Alger of Texas.

Representative Alger requested that, in detailing the powers of the Commission on Civil Rights, a reference should be made to the Commission studying facts pertaining to the "right to work" [103 Cong. Rec. at 9038]. The Judiciary Committee Chairman, Emanuel Celler of New York, replied that this was not germane to the bill. He stated [103 Cong. Rec. at 9038]:

"There has been a vacuum created in southern States with reference to according proper rights to people of a certain color and to people of certain origins. However, because the States have failed it is essential for the Federal Government to step in and say 'These are constitutional rights and they must be accorded to these people'. That is what this bill aims at, the constitutional rights."²⁹

See also 103 Cong. Rec. 9372.

²⁹ Particular weight is to be given statements made by the committee chairman in charge of a bill. *United States v. St. Paul, Minneapolis & Manitoba Ry. Co.*, *supra*.

However, Representative Alger was still concerned about the broad language of "civil rights" [see 103 Cong. Rec. 9367]. He therefore formally offered an amendment to include in the bill the study of the "right to work", stating [103 Cong. Rec. 9039]:

"The question was brought up in this debate on civil rights, and now I rephrase that to ask, what are civil rights? I asked that here on the floor of the House Friday afternoon, and nobody has told me anything except, under this bill, the right to vote."

Other Representatives agreed, pointing to the title of the bill which stated "further securing and protecting the civil rights". If this was so, why, they asked, did this not include the "right to work"?

At this juncture, Representative Keating made a point of order that the amendment was not germane and that a similar amendment had been ruled not germane the previous year³⁰ [103 Cong. Rec. 9040]. The Chairman, Aime Forand, sustained the point of order and ruled the amendment not germane. He ruled [103 Cong. Rec. 9040]:

"The Chair finds the bill has to do with political rights and the amendment has to do with labor rights."

There then followed a lively discussion as to what the Chairman meant by "political rights". The Chair replied that labor rights were not to be included, that voting was a political right, and that political rights and the right to vote are part of civil rights [*Id.*]. The Chair distinguished religion as a "religious right" when asked whether it was a "political right".

³⁰ H. R. 627 of the 84th Congress had been defeated in 1956. It had been broader than H. R. 6127, additionally requiring studies of sex discrimination and of economic and social aspects of equal protection, which had now been dropped from the bill in 1957. U. S. Code Cong. & Adm. News, H. Rept. 291, 85th Cong., 1st Sess., 1966-1969 (1957).

Later in the debate, Representative Mendel Rivers of South Carolina tried to offer a "right to work" amendment again. Representative Celler objected, stating [103 Cong. Rec. 9385]:

"... the amendment is not germane to the bill. It covers so-called economic rights; it deals with the subject of labor. This is a civil rights bill."

In again ruling the amendment not germane and sustaining the point of order, the Chairman commented [103 Cong. Rec. 9386]:

"The fundamental purpose of the bill now before us is the protection of civil rights with particular reference to the right to vote. The amendment offered by the gentleman from South Carolina deals with an economic right, the right of an individual to obtain and hold employment."²¹

It is thus plainly evident that the House considered the words "civil rights" to have a limited meaning—and explicitly ruled that so-called "economic rights" were not included in the bill. Obviously, "rights" to AFDC payments for welfare are no more than "economic rights". There is not a hint anywhere in these debates that Congress was opening the jurisdiction of the federal courts to consider anything other than voting rights cases. To the extent that the House even considered § 1343(4), it was indeed as "technical" as the House Report said it was.

When the proposed bill was presented in the Senate after passing the House, the debate centered around Part III, the section containing § 1343(4). Far from deciding to

²¹ This led Representative Rivers to facetiously suggest that the title "Civil Rights Act" was inappropriate and should be changed to the "Celler-Keating Political Act of 1957." [103 Cong. Rec. 9386.]

expand federal jurisdiction, the debate reflected the fear of the Senate that Part III of the bill was too broad and that the bill should be limited solely to voting rights. See 103 Cong. Rec. 11974-11977.³² The Senate was additionally concerned that section 1993, allowing the use of armed forces to enforce the Civil Rights Act, could be used to enforce what was considered to be the ambiguities of Part III of the bill. [See 103 Cong. Rec. 11980, remarks of Senator Hubert Humphrey.]

In the light of these concerns, Senator Francis Case of South Dakota proposed that instead of eliminating all of Part III, it would be best to eliminate only the substantive part, § 121, and retain § 122, the procedural part and the present language of § 1343(4), renumbered as § 121. He then stated his reason [103 Cong. Rec. 11980]:

“May I simply add that *the effect of section 122 is to preserve the protection of the voting rights and the right to sue in Federal Court to secure relief for deprivation of voting rights, which is in harmony, I think, with the tenor of the Senator's [referring to Senator Anderson] address.*” (Emphasis added)

Senator Case then submitted an amendment to change the caption of § 1343—to delete the period (.) after “Civil Rights” and to insert [*Id.*]:

“Sec. 1343. Civil Rights and elective franchise.”

There can thus be no doubt that the only purpose of preserving § 122 of Part III of the bill, should § 121 be eliminated, was to ensure jurisdiction in the federal courts solely for voting rights cases.

³² Senator Anderson reflected the prevailing feeling among the opposition in that he did not know what Part III meant. He thus proposed eliminating Part III and requested [103 Cong. Rec. 11980]:

“Let us act now to protect voting rights, forcefully, and so there can be no question.”

However, the debate on Part III continued, with many Senators expressing fears that this section implementing § 1985 had a potential of going beyond anything Congress would intend. Senator George Aiken of Vermont, in warning that Part III may go beyond the protection of voting rights, stated [103 Cong. Rec. 11981]:

"It has been represented to me that conceivably it could go into the matter of social security, and that it might result in the Federal Government undertaking to force uniform State laws so far as social security and unemployment payments were concerned."
(Emphasis added)

Senator Aiken thus joined with Senator Clinton Anderson of New Mexico in proposing an amendment to strike out Part III [see 103 Cong. Rec. 11998]. The two senators then joined with Senator Case in proposing to retain the jurisdictional provision of Part III that limited federal jurisdiction solely to voting rights cases. See 103 Cong. Rec. 11998, 12284, 12545, 12565.

The chief supporter of Part III was Senator Jacob Javits of New York. He believed that Part III did go beyond the protection of voting rights in that it protected all rights covered by the equal protection language of section 1985 [see 103 Cong. Rec. 12076-12077]. Senator Aiken thus asked Senator Javits if he would be willing to agree to a revision of Part III to make it plain that it referred only to speeding up integration and [103 Cong. Rec. 12077]:

"also insert language making it absolutely plain that Part III could never be used to invade other fields, such as social security, benevolent rights, and other things of that nature."

Senator Javits replied that he did not believe the "purpose, intent or, indeed, the construction of Part III [is] to lead the Federal Government into all the fields enumer-

ated." [103 Cong. Rec. 12077.] It thus becomes clear that not even the supporters of Part III had even an inkling that any section of Part III could ultimately give the federal courts jurisdiction over welfare cases.

When the Anderson-Aiken proposal to eliminate Part III came up for debate, Senator Anderson stated that he had conferred with Senator Case of South Dakota and decided to limit his amendment to striking only section 121 of Part III. Senator Case noted that his first amendment would have transferred § 122 [§ 1343(4)] from Part III to Part IV, but that he later submitted an amendment that would preserve § 122 in Part III and that the Anderson amendment does this. [*Id.*] In joining the Anderson-Aiken amendment, Senator Case specifically stated his purpose in retaining § 122 [*Id.*]:

"It deals *wholly* with the *establishment of jurisdiction for Federal courts to entertain suits relating to the right to vote.*" (Emphasis added)³³

The Anderson-Aiken-Case amendment thus was debated. The opponents of the amendment made a strong effort to save all of Part III by attacking the valuelessness of the jurisdictional provision remaining in Part III. Thus Senator Humphrey stated [103 Cong. Rec. 12557]:

"I consider striking section 121 from the bill the same as deleting all of Part III, because *all that would there*

³³ Senator Aiken stated that the effect of the modification would be "to permit members of the Senate to vote for the Knowland-Humphrey amendment [to repeal section 1993], and then to vote to strike the objectional (sic) portion of part III without embarrassment" [103 Cong. Rec. 12284]. While it is unclear as to what Senator Aiken meant, it appears that he was implying that certain members felt that § 122 would be needed to fully enforce all federal action in the area of voting rights. Certainly, Senator Aiken was not *sponsoring* an amendment to provide jurisdiction in social security cases after it had been he who had stated his fears that the bill might conceivably cover social security and then had to be reassured by Senator Javits to the contrary.

be left in the emasculated part III would be chapter headings and punctuation which add nothing to existing law." (Emphasis added)

Senator Joseph Clark of Pennsylvania commented [103 Cong. Rec. 12548-49]:

"The amendment would strike out section 121 of the civil rights bill. The rest of part III would thereby be rendered meaningless, as a practical matter." (Emphasis added)

Even Senator Richard Neuberger of Oregon, in stressing the "relatively modest" import of Part III, stated [103 Cong. Rec. 12545]:

"This part of the bill, as all other provisions of the bill, does not add any substantive law or extend Federal jurisdiction in the field of civil rights." (Emphasis added)

Therefore, when the Anderson-Aiken-Case amendment came up for a vote, the Senate was divided into two camps—the supporters of the amendment, who were fearful of an extension of federal jurisdiction in the civil rights area and thus wanted § 121 of Part III eliminated, and the opponents of the amendment, who felt that the Civil Rights Acts should be strengthened and that the retention of only § 122 was meaningless. Just before the vote, Senator Case again rose and explained why he was proposing to leave § 122 in as a continuation of Part III. He stated [103 Cong. Rec. 12559]:

"My intent in proposing the idea of leaving in the bill section 122, remembered as section 121, was to strengthen the so-called right to vote. The section would amend existing law so as to clarify the jurisdiction of the district courts in the entertainment of suits to recover damages, or to secure equitable or other relief

under any act of Congress providing for the protection of civil rights, including the right to vote." (Emphasis added)

Senator Case noted that he was now aware that the right to vote under § 1971 could be enforced through § 1983. However, he further noted that § 1343(4) [§ 122] was not limited to acts under color of state law, "[s]o in that sense" it is "perhaps somewhat broader than existing law." [*Id.*] He then reiterated his concern with the right to vote. The Anderson-Aiken-Case amendment passed by a vote of 52-38 [103 Cong. Rec. 12565].

There is nothing in the legislative history of § 1343(4) that even remotely suggests that its purpose was anything other than a clarification of the jurisdiction of the federal courts as to their powers to hear voting rights cases. The Senator sponsoring the amendment to retain § 1343(4) was concerned solely with strengthening voting rights [103 Cong. Rec. 11980, 12284, 12559]. The senators supporting broader federal powers in enforcing civil rights did not contest Senator Case's interpretation, but called § 1343(4) meaningless. Indeed, the very purpose for the introduction and passage of the Anderson-Aiken-Case amendment was to *eliminate* any potential references in the bill to any powers of the federal government in areas other than voting rights because of a concern that language referring to civil rights might be interpreted too broadly.²⁴ Not only was there no discussion that § 1343(4) could be applied to suits enforcing all federal statutes, including the Social Security Act, but Senator Javits, one of the strongest supporters of the bill, assured the Senate that the bill had nothing to do with social security [103 Cong.

²⁴ Just prior to the passage of the bill, there were comments by Senators Johnson, Knowland and Smith that the bill should be solely a right to vote bill [103 Cong. Rec. 12403-05]. Senator Johnson read into the record a New York Times editorial asking that the bill be limited to the right to vote so that it would have a chance of passing.

Rec. 12077].²² Senator Aiken would be surprised indeed to find out that the amendment that he sponsored in order to assure that state plans concerning social security programs could not be affected by the bill [103 Cong. Rec. 11981], instead turned out to grant to the federal courts increased jurisdiction to affect these very state plans. See *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966) [Court will look to intent of sponsors of a bill in determining its meaning].

Petitioners have ignored almost all of this legislative history and instead indulge in fanciful speculation as to what the Senate intended in passing § 1343(4). To the extent that § 1343(4) "extends" the jurisdiction of the district court, it does so in allowing the district court to hear constitutional and equal rights claims as to acts perpetrated by private individuals. See 103 Cong. Rec. 12559. Cf. *Jones v. Alfred H. Mayer Co.*, *supra*, 392 U.S. at 412. However, there was obviously no intention to extend the subject matter of federal jurisdiction to anything other than voting cases. This is clear from the amendment to the catch line of § 1343 set forth in § 122 of the bill, which added the words "and elective franchise" to the heading "Civil Rights". See *Brotherhood of Railroad Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528-29 (1947) [Heading of section important when it sheds light on an ambiguous phrase in a bill].

Far from extending the term "civil rights", Congress apparently was unsure whether the full panoply of voting rights was even included in § 1343(4), which spoke only of rights secured by the Constitution and Acts of Congress protecting equal rights. Here Congress was enacting a specific statute dealing with voting rights; it would have

²² It must be noted that the bill introduced and passed in 1957 specifically eliminated the language in Part I referring to the power of the Civil Rights Commission to investigate "economic and social" aspects of equal protection, which had been included in the bill passed by the House but defeated in the Senate in 1956. See U. S. Code Cong. & Adm. News, H. Rept. 291, *supra*, at p. 1968.

to fall under the heading of an equal rights act in order for there to be federal jurisdiction under the language of 1343(3). Voting rights may have been considered a grey area of "equal rights", and Congress wanted to make sure that the federal courts could hear *all* voting rights cases that it was authorizing to be brought by the Attorney General.³⁶ Cf. 103 Cong. Rec. 12559 [the purpose of 1343(4) was to "clarify" federal jurisdiction]. Therefore, it adopted the language "civil rights, including the right to vote", where the term "civil rights" referred to all of the constitutional and statutory rights included in section 1343(3), and included the right to vote. In the light of the legislative history of § 1343(4), there can be no other way to interpret this provision.³⁷

The result is that when petitioners retreat to their verbalistic argument [see pp. 40-41, *supra*] that section 1983 itself is an "Act of Congress providing for the protection of civil rights, including the right to vote", they are creating a hypothesis that has no relation to reality. This was the very type of claim raised in *Moor v. County of Alameda*, *supra*, where the petitioners attempted to obtain federal jurisdiction over suits against municipalities through an ingenious interpretation of the literal language of § 1988. This Court rejected the argument by looking to the legislative history of section 1983, which indicated that the interpretation suggested ran contrary to what Congress

³⁶ This would explain why Congress felt it necessary to amend § 1343 despite the existence of 28 U.S.C. § 1345. The jurisdiction provided there for suits brought by the Attorney General was qualified by the words "[E]cept as otherwise provided by Act of Congress."

³⁷ Since Congress felt it necessary to specifically add a reference to voting rights in § 1343(4), it obviously considered § 1343(3) to have a limited meaning. Petitioners' claim that § 1343(3) incorporates the entire spectrum of federal law under § 1983 [Pet. Brief, pp. 50-59] thus becomes frivolous.

had intended. This Court stated [411 U.S. at 709]:

"For in interpreting the statute it is not our task to consider whether Congress was mistaken in 1871 in its view of the limits of its power over municipalities; rather, *we must construe the statute in light of the impressions under which Congress did in fact act. . . .*" (Emphasis added)

In 1957, Congress was acting to pass a very narrow voting rights bill in an effort to placate the South and avoid a filibuster in passing the first Civil Rights Act since Reconstruction.³³ The Senate was so sensitive to any expansion of federal jurisdiction over the states that it unanimously voted to repeal section 1993 (allowing the use of armed forces to protect civil rights) so that the bill would have a chance of passing. The Senate was so unsure about the scope of the equal protection language of § 1985 that it struck the enforcement section pertaining to that statute from the bill because it feared it would encompass areas greater than voting rights and thus infringe on traditional states rights. In the face of this picture of Congress cautiously and tentatively overcoming the opposition of those favoring states rights in passing its first civil rights bill in almost a century, it becomes absurd to claim that Congress surreptitiously sneaked into the bill a provision that gave the federal courts jurisdiction over any state action in the field of social welfare. When the history of section 1343(4) is looked at "in light of the impressions under which Congress did in fact act", *Moor v. County of Alameda, supra*, it can be seen that no such meaning could possibly be attributed to § 1343(4). See also *Richards v. United States*, 369 U.S. 1, 11 (1962) [holding that it is "fundamental" that a section of a statute should not be read in isolation from the context of the whole act].

³³ See Eric F. Goldman, *The Crucial Decade—and After*, Vintage Books, 1960, pp. 297-98.

Cases such as *Gomez v. Florida State Employment Service, supra*, and its progeny [see Pet. Brief, p. 40] are thus incorrectly decided, as they never even mention what Congress intended when it passed § 1343(4). See Note, Columbia L. Rev., at p. 1427. Every Court that has indicated its awareness of the legislative history of section 1343(4) has rejected any contention that this section opens up the federal courts to welfare claims under § 1983. See *Rosado v. Wyman*, 414 F. 2d 170, 181 (2d Cir. 1969) (concurrency of *Lumbard, J.*); *rev'd* 397 U.S. 397 (1970); *Almenares v. Wyman, supra*; *Mattingly v. Elias, supra*; *McCall v. Shapiro, supra*.

In the light of the legislative history of section 1343, it is clear that there is no special federal jurisdiction, other than general federal question jurisdiction (28 U.S.C. § 1331), for suits brought alleging violations of the Social Security Act. The Court below thus correctly dismissed the complaint in the absence of a substantial constitutional claim.

D. Congress Explicitly Intended that There Be No Federal Jurisdiction for Social Welfare Suits Arising Under the AFDC Provisions of the Social Security Act.

Having failed to show that § 1343 provides jurisdiction for suits arising under the Social Security Act, petitioners are compelled to finally argue that this Court disregard the clear intent of Congress because petitioners feel it would be wiser and more practical to hear welfare cases in the federal courts. They point to the history of the 1871 Civil Rights Acts as providing a federal forum for certain acts committed under color of state law, and while they state that the assumptions of 1871 are not now relevant, they assert that there are important reasons applicable "today" for this Court to create a federal remedy [Pet. Brief, p. 60]. Whatever these speculations, they have nothing to do with what Congress intended.

When Congress set up the Social Security program in 1935, it created only a program of federal grants-in-aid to states to be used for AFDC recipients. 42 U.S.C. § 601 authorizes Congress to appropriate "for each fiscal year a sum sufficient to carry out the purposes" of "encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in each State," These sums "shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children." The following section (§ 602) enumerates the provisions which State plans must contain in order to be eligible for federal funding. Section 604 permits the Secretary of HEW, after notice and hearing, to find that a State has failed "to comply substantially with any provision required by section 602(a) . . . to be included in the plan," and to "notify such State agency that further payments will not be made to the State until the Secretary is satisfied that such prohibited requirement is no longer so imposed, and that there is no longer any such failure to comply." There are no other remedies provided in the Act.

It is thus clear that Congress never envisioned that every controversy arising out of the administration by the states of the AFDC program be heard in the federal courts. The only parties granted the right to initiate any action under this program are the state and federal governments. No federal remedy was contemplated for the individual recipient of AFDC funds. This is in sharp contrast to the remedy provided to an individual recipient of federal funds under the Federal Old Age, Survivors and Disability Insurance provisions of the Social Security Act. Here Congress set forth provisions for hearings before the Secretary and explicitly provided for judicial review of individual

claims in the federal district courts. 42 U.S.C. § 405 (b), (g). If Congress was concerned that the state courts could not adequately protect any federally created rights in the area of individual AFDC claims, it had every opportunity to provide similar jurisdiction. Cf. *Mitchum v. Foster*, *supra*, 407 U.S. at 242. Congress has always provided original jurisdiction in the federal court without monetary limitation where it felt it was necessary. See e.g. 28 U.S.C. § 1333 (admiralty); § 1334 (bankruptcy); § 1337 (commerce); § 1338 (patents); § 1339 (postal matters); § 1340 (tax actions). See *McClellan v. Shapiro*, 315 F. Supp. 484, 487, fn. 7 (D. Conn. 1970).

Since Congress purposefully did not create a federal remedy for petitioners under the Social Security Act when it had the express opportunity to do so, petitioners cannot ask this Court to carve out a remedy under the Civil Rights Act. *Preiser v. Rodriguez*, 411 U.S. 475 (1973). The Social Security Act should only be enforced by the remedies prescribed therein. See *Schatte v. International Alliance of Theatrical Stage Employees*, 182 F. 2d 158 (9th Cir. 1950), *cert. den.* 340 U.S. 827, *reh. den.* 340 U.S. 885 (1950). If the Civil Rights Acts were to be construed to provide a remedy for every right created by federal law, the entire framework of legislation which Congress created would be disrupted, since many statutory remedies are carefully designed to meet the complexities peculiar to the act to which they apply. See Note, *Harvard L. Rev.*, *supra*, at pp. 1291-92, 1293, fn. 41.

By providing for the individual States to formulate their own plans subject to HEW approval, Congress clearly intended that the administration and enforcement of the AFDC programs be with the States. Indeed, this Court has continually emphasized the broad discretion States have in administering these welfare programs. See e.g. *Dandridge v. Williams*, *supra*; *Rosado v. Wyman*, *supra*. Substantial state monies are involved in the AFDC pro-

gram. See 42 U.S.C. § 603. If the conclusion urged upon this Court by petitioners is adopted, every single social welfare claim could be brought in the federal courts, as the requirement of HEW's approval of state plans guarantees that a cause of action can be stated under the HEW regulations. There is no indication whatever that Congress intended that each and every minor dispute involving, e.g., whether an individual recipient received a proper check, must be heard in federal court—and without the utilization of any of the state administrative remedies set up for the very purpose of correcting minor administrative errors. *Cf. Carter v. Stanton, supra.*

Petitioners are aware that their interpretation gives the federal courts original jurisdiction over just about every welfare claim. They suggest that Congress would act to narrow this jurisdiction after having its entire legislative scheme thrown out by the courts [Pet. Brief, p. 78]. This is reverse reasoning. It is the intent of Congress that controls considerations of social policy, not the intent of petitioners. If Congress believes that the federal courts should today have jurisdiction of every welfare claim, it can readily do so by amending the Social Security Act in the same manner that it has always done throughout its concern with social welfare. The problems that petitioners believe exist in the current AFDC program [Pet. Brief, pp. 59-63] would form the basis of the very legislative facts that Congress would have to consider in devising a remedy consistent with the complexities of the State and federal administrative and judicial systems.

It is clear that Congress never intended to create jurisdiction in the federal courts for claims arising under the AFDC provisions of the Social Security Act. It did not so intend in 1935, when it passed the Act specifying federal jurisdiction in areas other than AFDC programs; it did not so intend in 1957, when it clarified federal jurisdiction over voting rights cases; it clearly did not so intend

in 1871, when the concept of a federally financed social welfare system did not exist. In the absence of any Congressional intent whatever, this Court should not accept petitioners' tortured verbalistic analysis of § 1343 as providing federal jurisdiction for claims that were never contemplated to be heard in the federal courts.

CONCLUSION

The order of the Court below should be affirmed.

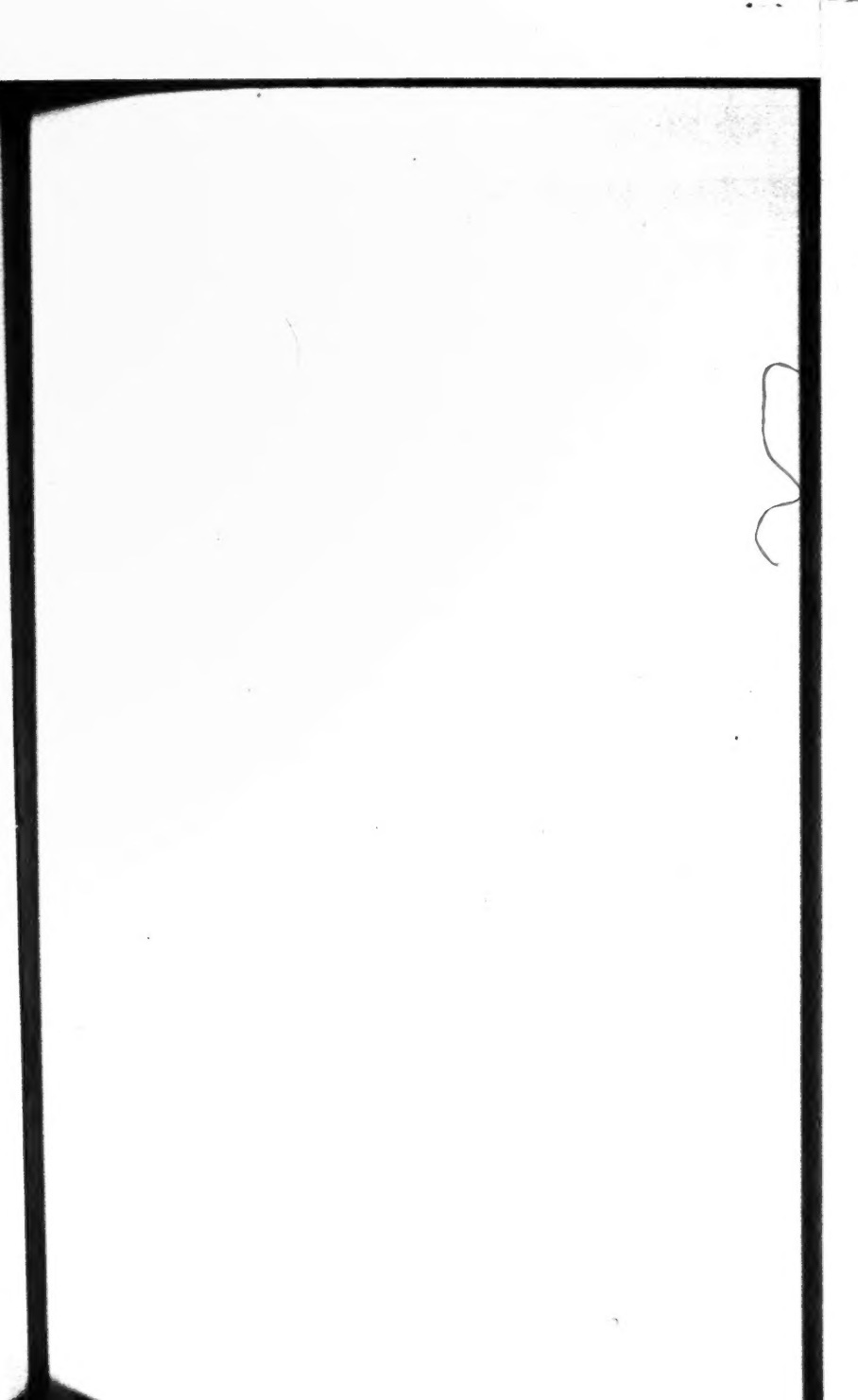
Dated: New York, New York, October 5, 1973.

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~~STUART ROBBE, JR., CLERK~~

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-6476

CYNTHIA HAGANS, for herself and her two infant children, KIMBERLY and KOREY; BERTHA GRISSETT, for herself and her five infant children, DEBORAH, ANGELO, WILLIAM, LINDA and CYNTHIA; KATHRYN ZAVERZENCE, for herself and her infant child, DANA LYNN; KOREN HORNECK, for herself and her infant child, TODD, and her intrauterine child yet unnamed; EURLEEN CARSON, for herself and her two infant children, TIMOTHY and CALVIN; BARBARA SIEMILLER, ELIZABETH ELY and BARBARA LYNCH, as individuals and on behalf of all other persons similarly situated,

Petitioners,

v.

ABE LAVINE, as Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, as Commissioner of the Nassau County Department of Social Services,

Respondents.

REPLY BRIEF OF PETITIONERS

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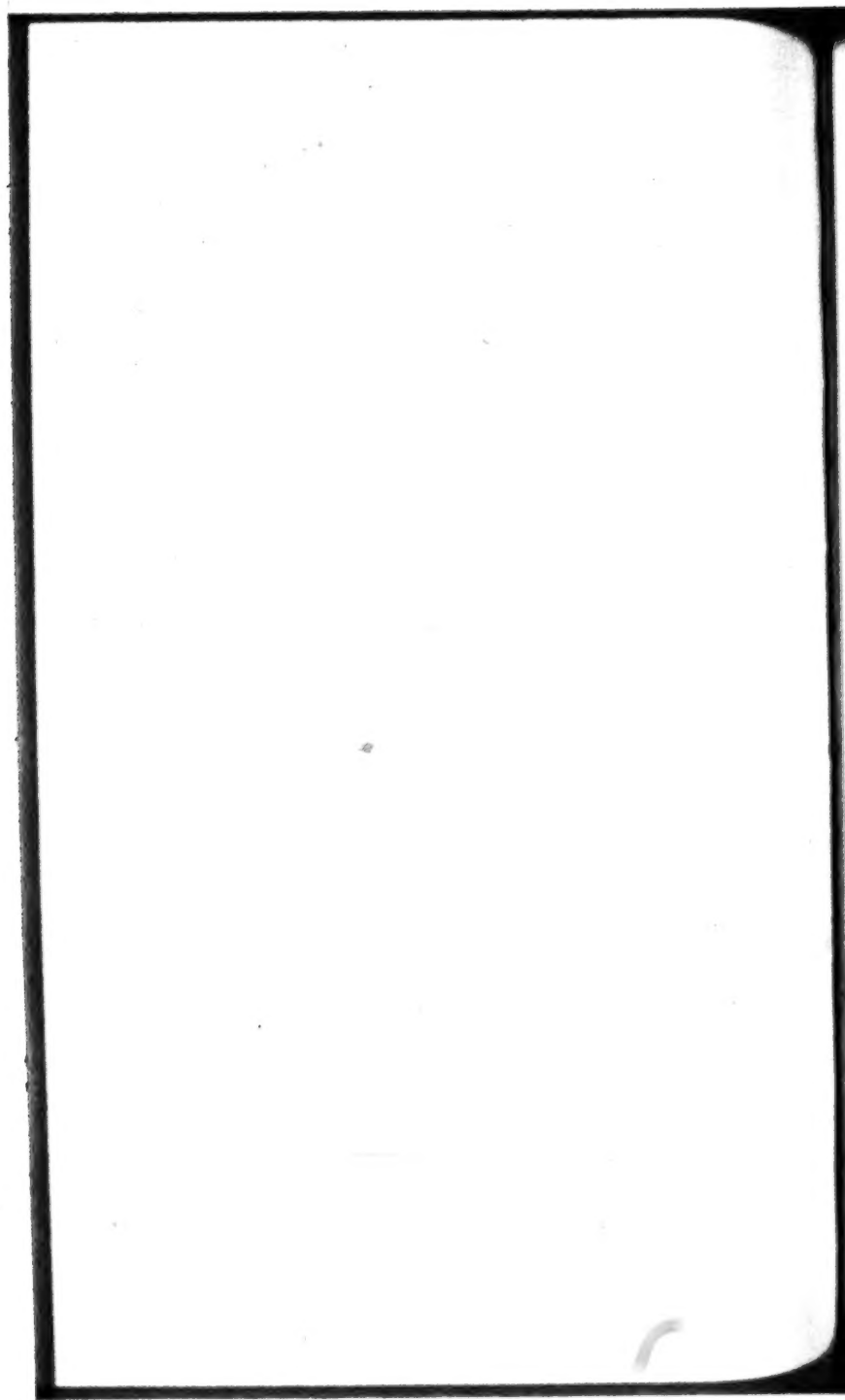


TABLE OF CONTENTS

	<u>Page</u>
POINT I	
The Constitutional Claims Pleaded in the Complaint Are Substantial and Are Sufficient to Establish Jurisdiction Under 28 U.S.C. §1343(3)	1
POINT II	
Section 1983 Provides a Remedy for the Deprivation of Rights Secured by the Social Security Act and Is an Act of Congress Providing for Equal Rights and the Protection of Civil Rights Within the Meaning of 28 U.S.C. §1343(3) and (4)	9
A. Section 1983 Provides a Remedy for the Deprivation of Rights Secured by Federal Laws, Including the Social Security Act	9
B. Section 1983 Is an "Act of Congress Providing for Equal Rights. . ." Within the Meaning of 28 U.S.C. §1343(3)	12
C. Section 1983 Is an "Act of Congress Providing for the Protection of Civil Rights. . ."	17
CONCLUSION	
The Court Should Hold That the District Court Had Jurisdiction To Determine the Merits of Petitioners' Claims. The Judgment of the Court Below Should Be Reversed and the Case Remanded with Appropriate Direction	23

TABLE OF AUTHORITIES

Cases:

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970)	11
Baker v. Carr, 369 U.S. 186 (1962)	8
Boddie v. Connecticut, 401 U.S. 371 (1971)	5

(ii)

	Page
Boynton v. Commonwealth of Virginia, 364 U.S. 454 (1960)	6
Carleson v. Remillard, 406 U.S. 598 (1972)	9
Carter v. Stanton, 405 U.S. 661 (1972)	8
Dandridge v. Williams, 397 U.S. 471 (1972)	6, 7, 8
Georgia v. Rachel, 384 U.S. 780 (1966)	10
Goosby v. Osser, 409 U.S. 512 (1973)	8
Hague v. C.I.O., 307 U.S. 996 (1939)	16
Holt v. Indiana Manufacturing Co., 176 U.S. 68 (1900)	12
Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)	10
Kiefer-Stewart Co. v. Joseph H. Seagram & Sons, 340 U.S. 211 (1951)	6
King v. Smith, 392 U.S. 309 (1968)	6, 9
Lewis v. Martin, 397 U.S. 552 (1970)	9
Lynch v. Household Finance Corp., 405 U.S. 538 (1972)	12, 18
Money v. Swank, 432 F.2d 1140 (7th Cir. 1970)	8
Monroe v. Pape, 365 U.S. 167 (1961)	13
Montana Catholic Missions v. Missoula County, 200 U.S. 118 (1906)	8
Poresky, Ex Parte, 290 U.S. 30 (1933)	5
Reed v. Reed, 404 U.S. 71 (1971)	2, 4
Rosado v. Wyman, 397 U.S. 397 (1970)	5, 9
Slaughter-House Cases, 16 Wall 36 (1872)	15
Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969)	10
Townsend v. Swank, 404 U.S. 282 (1971)	8, 9

(III)

	Page
United Brotherhood of Carpenters v. United States, 330 U.S. 395 (1947)	6
United States v. Waddell, 112 U.S. 76 (1884)	16

Constitution Provisions:

United States Constitution

Fourth Amendment	13
Thirteenth Amendment	10, 13
Fourteenth Amendment	10, 13
Fifteenth Amendment	10, 13

Federal Statutes:

18 U.S.C. 241	17
18 U.S.C. 242	17
28 U.S.C. §1331	11, 17
28 U.S.C. §1343	12
28 U.S.C. §1343(3)	<i>passim</i>
28 U.S.C. §1343(4)	<i>passim</i>
28 U.S.C. §1443	10
42 U.S.C. §602(a)(7)	6
42 U.S.C. §602(a)(10)	6
42 U.S.C. §1971	10
42 U.S.C. §1981	10
42 U.S.C. §1982	10
42 U.S.C. §1983	<i>passim</i>
42 U.S.C. §1985	<i>passim</i>

Civil Rights Act of 1866, Act of April 9, 1866, ch.

31, 14 Stat. 27	<i>passim</i>
-----------------------	---------------

Civil Rights Act of 1870, 16 Stat. 140 (1870)

Civil Rights Act of 1871, Act of April 20, 1871, ch.

22, 17 Stat. 13	<i>passim</i>
-----------------------	---------------

Act of March 3, 1875, 18 Stat. 470

Social Security Act of 1935 - §402(a)(7)

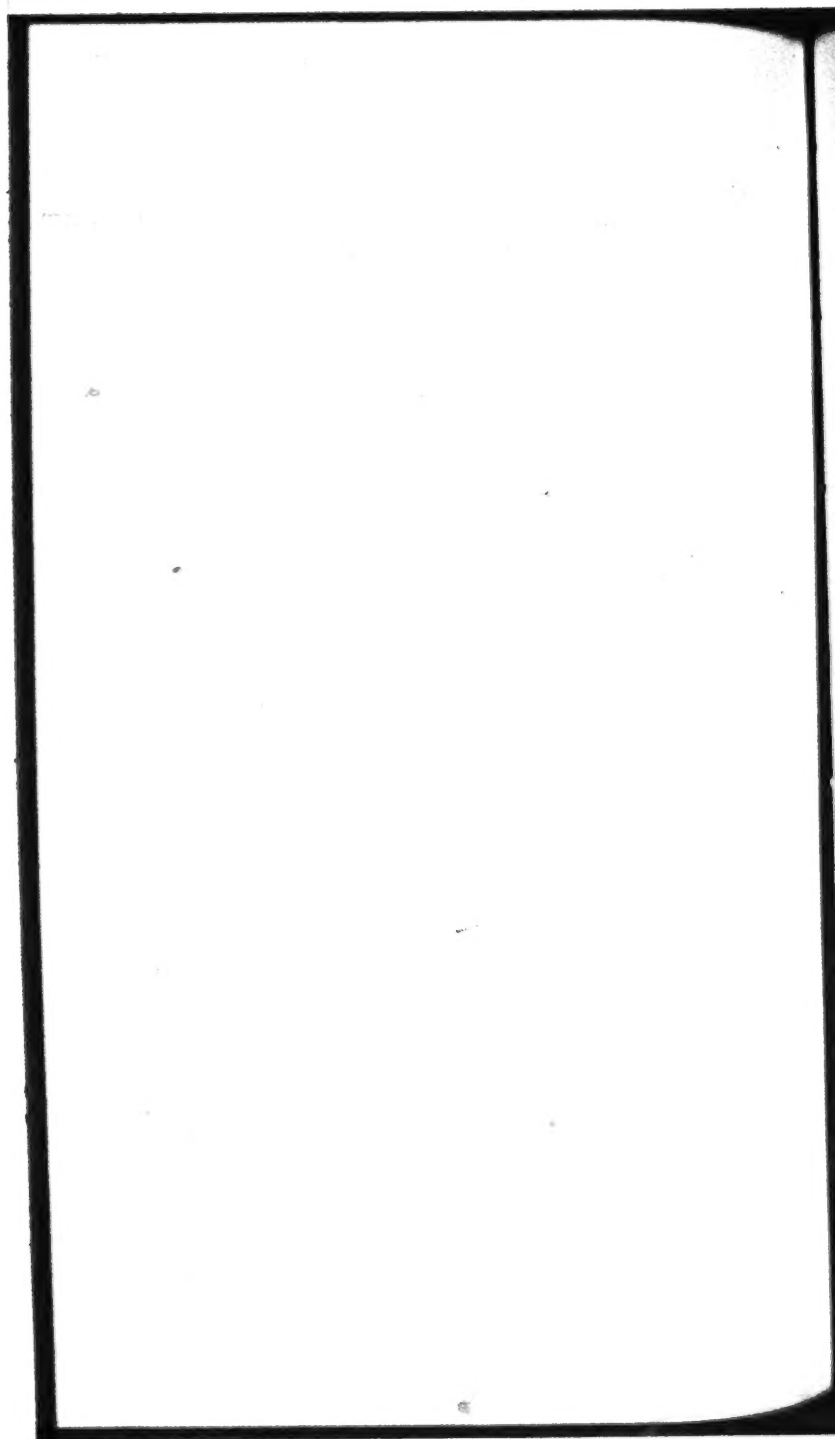
Social Security Act of 1935 - §402(a)(10)

(iv)

	<u>Page</u>
<i>Federal Regulations:</i>	
45 C.F.R. 233.20(a)(3)(ii)(c)	7
45 C.F.R. 233.20(a)(3)(d)	7
45 C.F.R. 233.20(a)(12)	7
<i>New York Statutes:</i>	
New York Social Services Law §350-j	4
<i>Federal Rules of Civil Procedure:</i>	
Rule 8(a)(1)	5
Rule 8(a)(2)	5
<i>Supreme Court Rules:</i>	
Rules 23(1)(c)	5
Rules 40(1)(d)(2)	5
<i>103 Cong. Rec.:</i>	
11980	21
11981	20, 21
12077	21
12080	19
12083	19
12087	20
12090	21
12097	19
12283	20
12541	20
12545	20
12558	19
12559	19
12560	19
<i>H.R. 6127, 85th Cong., 1st Sess. (1957)</i>	
§121	20, 21, 22
§122	20, 21

Other Materials:

<i>Moore's Manual Federal Practice and Procedure, Vol.</i>	
1, §10.04(2)	5
<i>Note, Federal Jurisdiction Over Challenges to State</i>	
<i>Welfare Programs, 72 Colum. L. Rev. 1404 (1972)</i>	12



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-6476

CYNTHIA HAGANS, for herself and her two infant children, KIMBERLY and KOREY; BERTHA GRISSETT, for herself and her five infant children, DEBORAH, ANGELO, WILLIAM, LINDA and CYNTHIA; KATHRYN ZAVERZENCE, for herself and her infant child, DANA LYNN; KOREN HORNECK, for herself and her infant child, TODD, and her intrauterine child yet unnamed; EURLEEN CARSON, for herself and her two infant children, TIMOTHY and CALVIN; BARBARA SIEMILLER, ELIZABETH ELY and BARBARA LYNCH, as individuals and on behalf of all other persons similarly situated,

Petitioners,

v.

ABE LAVINE, as Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, as Commissioner of the Nassau County Department of Social Services,

Respondents.

REPLY BRIEF OF PETITIONERS

POINT I

THE CONSTITUTIONAL CLAIMS PLEADED IN THE COMPLAINT ARE SUBSTANTIAL AND ARE SUFFICIENT TO ESTABLISH JURISDICTION UNDER 28 U.S.C. §1343(3).

The respondent attempts to denigrate the merit of the equal protection challenge by erroneously asserting, "(p)etitioners are demanding to be treated better than

similarly treated recipients. They cannot claim a denial of equal protection because the respondents desire to treat them the same as others so situated." (Brief for Respondent at 20). Such paralogy fails to obscure the substantiality of the constitutional claim, for under the recoupment regulation everyone is not treated equally. Petitioners do argue that the recoupment regulation is violative of the equal protection strictures because it irrationally creates two classes of needy, dependent children receiving benefits under the State's Aid to Dependent Children (AFDC) program. Children whose parents required an emergency rent disbursement to forestall an eviction or secure housing are deprived of their right to have their eligibility for financial assistance determined in accordance with federally-imposed requirements by means of invidious discrimination and as a consequence are deprived of the state-determined level of assistance provided to all other needy children for as long as six months.

The practical effect of the recoupment regulation is not equality of treatment, but the punishment of needy children by depriving them of a substantial portion of AFDC assistance which they are eligible to receive because their parent has required an emergency rent disbursement in a prior month which is no longer available to meet the child's needs. While the State, no doubt, has a legitimate legislative purpose in deterring mismanagement, and while equality of treatment is rationally related to that purpose, the means chosen by the State are inconsistent with the Equal Protection Clause. The regulation does not advance the legislative objective in a manner consistent with the command of the Equal Protection Clause. *Reed v. Reed*, 404 U.S. 71, 76 (1971). The regulation is thus not the exemplar of

equal treatment, but rather of invidious discrimination and irrationality.

The rationality proffered by the State in support of the classification must necessarily be assessed in light of the purpose and intent of the Social Security Act. The Act represents a Congressional determination of the content of the Equal Protection Clause with respect to implementing state legislation. The public assistance programs under the Social Security Act were enacted to provide financial aid for unmet subsistence needs after other income and resources have been taken into account. While New York might contend that it is not required by the Act to make emergency rent disbursements, it is incontestable that if it elects to do so it must abide by the federal requirements governing determination of the availability of income and determination of need on an objective and equitable basis.

While it has been argued that the recoupment regulation is designed to deter mismanagement, it is clear that the regulation does not turn on mismanagement. Recoupment is mandated whenever an emergency rent disbursement is made to forestall an eviction. The court below recognized that recipients are threatened with eviction for a variety of reasons, often without regard to fault. (A-115). The State attempts to defend the regulation from the equal protection challenge by contending that it is designed to deter mismanagement since all petitioners "are in the position of having misallocated money given to them to pay rent." (Respondent's Brief at 19). And yet, in response to the due process claim, the State argues that "recoupment is not limited to proven cases of mismanagement. . . ." (Respondent's Brief at 14, fn. 9). Moreover, it strains rationality to pretend as the State does, that the problem of mismanagement can be solved

by depriving destitute families of the means to feed, clothe and shelter themselves during the period of recoupment.

The recoupment regulation represents the "very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment." *Reed v. Reed, supra* at 76. New York does not even treat all who it claims have misallocated their shelter allowances and who receive emergency rent disbursements equally. The State is in the anomalous position of defending the recoupment regulation on the grounds that it is a rational means to deter mismanagement and it "encourages proper money management," (Respondent's Brief at 23), while at the same time exempting from the reach of the recoupment regulation those recipients who mismanage shelter allowances, are evicted from their housing and are rehoused in motels and hotels at additional expense. Thus, recipients who have clearly mismanaged receive their basic needs in full and suffer neither recoupment nor reimbursement. (A-63). On the other hand, petitioners, often for circumstances beyond their control and unrelated to mismanagement, receive an emergency rent disbursement, but under the challenged regulation are compelled to suffer the devastating consequences of recoupment for as long as six months. Another class exempt from the impact of recoupment are recipients who receive emergency rent disbursements pursuant to the provisions of New York Social Services Law §350-j as emergency assistance to avoid destitution. Yet respondent continues to contend that such disparate treatment is "incontestably reasonable". (Brief for Respondent at 20).

Respondent also seeks to impugn the actuality of the due process claim which plainly appears on the face of the complaint. (A-14). It is well settled by the decision of

this Court that "(t)he existence of a substantial question must be determined by the allegations of the bill of the complaint." *Ex parte Poresky*, 290 U.S. 30, 32 (1933).¹ The due process claim is, and has always been in this case although not specifically raised in the petition for certiorari. The Court's rules and practice provide that the statement of a question presented "will be deemed to include every subsidiary question fairly comprised therein." (See Supreme Court Rules 23(1)(c)). The concepts of equal protection and due process are overlapping ones as this Court has often recognized. (See, e.g., *Boddie v. Connecticut*, 401 U.S. 371 (1971)). While the Court will not generally consider questions unless presented in the petition for certiorari, "the court, at its option, may notice a plain error not presented." Supreme Court Rules

¹ The failure of the intervenors to plead the due process claim does not constitute an abandonment of the claim since it is Hornbook law that intervention is ancillary to the principal action. The intervenors entry into the action was on the remand after both the district court and circuit court had found federal jurisdiction to determine the issues presented, therefore they were not required to plead grounds of jurisdiction to support their claim. See Fed. R. Civ. P. 8(a)(1). There is no requirement that the pleadings state particular facts, evidence or law. All that is required is a "short and plain statement of the claim showing that the pleader is entitled to relief. . . ." Fed. R. Civ. P. 8(a)(2). The Federal Rules have done away with the narrow "theory of the pleadings" doctrine which had required a pleader to state a definite theory of his case. See J. Moores *Manual, Federal Practice and Procedure*, Vol. 1, §10.04(2). A persuasive analogy is to be found in *Rosado v. Wyman*, 397 U.S. 397, 405 (1970), where the Court rejected a conceptual approach that would require jurisdiction over the primary claim at all stages as a prerequisite to resolution of the pendent claim. In *Rosado* the Court held that mootness of the equal protection claim did not divest the district court of jurisdiction to determine the pendent claim that certain provisions of the New York Welfare Law were incompatible with the federal Social Security Act.

40(1)(d)(2). To avoid reaching broad constitutional issues presented by the petition, the Court has often disposed of cases by deciding questions not presented by the petition. *Boynton v. Commonwealth of Virginia*, 364 U.S. 454, 457 (1960); *United Brotherhood of Carpenters v. United States*, 330 U.S. 395, 412 (1947). Moreover, since the due process claim presents an alternative basis for upholding federal question jurisdiction, is plainly set forth on the face of the complaint and raises "only issues of law not calling for examination or appraisal of evidence," *Kiefer-Stewart Co. v. Joseph H. Seagram & Sons*, 340 U.S. 211, 214 (1951), it would be appropriate for the Court to consider it since it is dispositive of the threshold question of jurisdiction and would thus make it unnecessary to consider more far reaching questions.

Respondent's reliance upon *Dandridge v. Williams*, 397 U.S. 471 (1970), as dispositive of the threshold question of jurisdiction is misplaced. *Dandridge* involved a challenge to a maximum grant limitation, whereas this case involves a denial of benefits to needy, dependent children on the basis of irrational and invidious discrimination. Moreover, in sharp contrast to *Dandridge* where both Congress and HEW had expressly approved the adoption by states of maximum grants in the allocation of AFDC funds, here both Congress and HEW have unmistakably declared that states, in determining eligibility for benefits, may only consider income or resources actually available, and may not assume (without proof) as New York does under the challenged regulation, that money expended to meet needs in a prior month remains available to meet subsistence needs during the subsequent period of recoupment. 42 U.S.C. §602(a)(7) and (10); *King v. Smith*, 392 U.S. 309, 319 n. 16. In a brief filed by HEW on behalf of the United States as *Amicus Curiae*, the

agency charged by Congress with the interpretation of the Social Security Act, the recoupment regulation was construed as violative of the federal statute and HEW regulations.² For as we have demonstrated in our main brief (See Petitioner's Brief pp. 23-30) the New York regulation fails to pass constitutional muster even under the *Dandridge* standard since it is clearly not rationally based and free from invidious discrimination.

Respondent's broad-sweeping application of *Dandridge* as foreclosing any equal protection challenge in the area of social-welfare legislation disregards the decisions of the

²The State's pronouncement (Respondent's Brief at 7, fn. 8) that the views of HEW are no longer those expressed in its *Amicus* brief is without foundation in fact or law. The flaw in the State's contention that 45 CFR §233.20(a)(12) (added after the repeal of §233.20(a)(3)(ii)(d)) now "sanctions recoupment regardless of the reason" is two-fold. First, the cited regulation by its very terms is limited to "overpayments". The State has repeatedly contended that "the advances made to plaintiffs to forestall eviction are not 'overpayments'." (See Respondent's Circuit Court Brief in *Hagans I* at 35). HEW agrees that the emergency rent disbursements are not overpayments but are disbursements made to meet current needs. In its *Amicus* brief, HEW stated "for the purposes of claiming matching federal funds, New York treats these disbursements as correct payments. Federal funds can be utilized only to match payments of assistance, but not payments otherwise characterized, such as loans". See Brief for HEW as *Amicus Curiae* at App. 8 in Petitioner's Brief. Secondly, the provision cited by the Respondent is not the regulation directly involved here. The controlling regulation and the one cited by the district court is 45 CFR §233.20(a)(3)(ii)(c); this regulation continues to remain in full force and effect and requires that states, in determining financial eligibility and the amount of assistance granted, may only consider such net income as is actually available for current use on a regular basis. Thus, New York remains forbidden from creating presumptions of availability of income and the regulation continues to be in contravention of federally imposed requirements.

Court in *Townsend v. Swank*, 404 U.S. 282 (1971), and *Carter v. Stanton*, 404 U.S. 669 (1972).³ In both *Townsend* and *Carter*, social-welfare legislation was challenged as violative of the Equal Protection Clause of the Fourteenth Amendment and the provisions of the Social Security Act, and notwithstanding the decisions cited by respondent in support of its contention that the constitutional claims are frivolous, the Court upheld federal jurisdiction determining the constitutional claims to be substantial. Significantly, the Court cited *Dandridge* in support of its finding of substantiality. *Townsend, supra*, at 292 (dictum); *Carter, supra*, at 671.

Since the complaint plainly sets forth constitutional claims which have "some foundation of plausibility," *Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 130 (1906), are not "absolutely devoid of merit," *Baker v. Carr*, 369 U.S. 186, 189 (1962), and have not been inescapably rendered frivolous by prior authoritative decisions, *Goosby v. Osser*, 409 U.S. 512 (1973), federal jurisdiction was obtained by the district court.

³The case of *Money v. Swank*, 432 F.2d 1140 (7th Cir. 1970), cited by the respondent in support of its argument that the holding of *Dandridge* precludes a finding of jurisdictional substantiality of the equal protection claim, clearly demonstrates the unreliability of such sweeping application. In *Townsend v. Swank*, 404 U.S. 282 (1971), the issues declared frivolous by the *Money* court, were held to be substantial and the Court concluded jurisdiction was not precluded by its earlier decision in *Dandridge*. From a standpoint of judicial economy, it would thus appear that the more appropriate course for lower courts to follow would be to assume jurisdiction and dispose of important questions on their merits.

POINT II

SECTION 1983 PROVIDES A REMEDY FOR THE DEPRIVATION OF RIGHTS SECURED BY THE SOCIAL SECURITY ACT AND IS AN ACT OF CONGRESS PROVIDING FOR EQUAL RIGHTS AND THE PROTECTION OF CIVIL RIGHTS WITHIN THE MEANING OF 28 U.S.C. §§1343(3) AND (4).

A. Section 1983 Provides a Remedy for the Deprivation of Rights Secured by Federal Laws, Including the Social Security Act

Faced with the clear, unambiguous provision in §1983 for a cause of action to redress the deprivation of rights secured by "laws" of the United States, and the incontestable fact that the Social Security Act and §§402(a)(7), (a)(10) in particular, are such "laws",⁴ respondent urges the Court to interpret "laws" as applying only to the Civil Rights Acts of 1866 and 1870, 42 U.S.C. §§1971, 1981 and 1982. He reasons that since these statutes as originally enacted contained their own

⁴ Respondent, despite the long line of unequivocal decisions of this Court, claims that "it is doubtful" that the Social Security Act secures to petitioners any rights at all. (Respondent's Brief at 34, n.22). He reasons that since a state has an option not to participate in the AFDC program, "Rights are 'secured' to individual recipients only to the extent the states decide to comply with the program." *Ibid.* Surely the teaching of *King v. Smith*, 392 U.S. 309 (1968), *Rosado v. Wyman*, 397 U.S. 397 (1970), *Lewis v. Martin*, 397 U.S. 551 (1970), *Townsend v. Swank*, 404 U.S. 282 (1971), *Carleson v. Remillard*, 406 U.S. 515 (1972), is that so long as the states continue to use federal money in their AFDC programs recipients have the right to have those funds distributed in accordance with the conditions set forth by Congress. New York may drop out of the AFDC program, but unless and until it does so, petitioners have a right to have their grants computed in accordance with §§402(a)(7), (a)(10) of the Social Security Act.

remedial provisions, when they were later separated out in the codification and revision of 1875 the phrase "and laws" had to be added to §1983 so that actions under §§1971, 1981 and 1982 would continue to be "authorized by law" as required by §1343(3). (Respondent's Brief at 30-31). Having so concluded, respondent argues that only laws enforcing the Thirteenth, Fourteenth and Fifteenth Amendments were intended to be included by the word "laws". (Respondent's Brief at 32).

The obvious flaw to this argument is that had Congress intended in 1875 to limit §1983 to "some" laws, it would have done so. Even assuming the revisor may have thought it necessary to specifically provide for §§1971, 1981 and 1982 remedies through §1983, but cf. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 414, n. 13 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969) (holding that such remedies could be implied from §1982 directly) he and the Congress deliberately used the broader, unrestricted word "laws" to accomplish that purpose, thus going beyond that purported particular immediate concern which may have prompted their action. By using in §1983 the open-ended phrase, "any right . . . secured by the Constitution and laws", Congress authorized a federal remedy to redress deprivation of both existing and future Constitutional and federal statutory rights. Cf. *Georgia v. Rachel*, 384 U.S. 780, 789 (1966).⁵

⁵In *Rachel*, the Court held that when Congress codified the removal provision of what is now 28 U.S.C. §1443 to provide for removal when a person cannot enforce in state court "a right under any law providing for the equal civil rights of citizens. . .", the language it chose did "not suggest that it intended to limit the scope of removal to rights recognized in statutes existing in 1874. On the contrary, Congress' choice of the open-ended phrase 'any law providing for . . . equal civil rights' was clearly appropriate to permit removal in cases involving 'a right under' both existing and future statutes that provided for equal civil rights." *Id.* at 789.

Respondent points to no evidence which supports his view that "laws" means only the 1866 and 1870 Civil Rights Acts, and as the same law review note upon which respondent relies for his point (Br. 31) concludes, "such a limited interpretation (i.e., "laws" means only the 1866 and 1870 Civil Rights Acts) would be inconsistent with the overall purpose of the 1871 Act as indicated by its legislative history—to provide a remedy for all class deprivations." *Note, Federal Jurisdiction Over Challenges to State Welfare Programs*, 72 Colum. L. Rev. 1404, 1419 (1972).⁶ That Congress did not contemplate the post New Deal surge in legislation creating new rights and entitlements for the American people (see Respondent's Brief at 33) is completely beside the point. Congress was surely aware of the likelihood that it would enact future statutes, just as it knew that it had enacted statutes prior to 1866, but it nonetheless failed to restrict the cause of action it had created to those arising from the deprivation of a right secured by any particular law.⁷ If Congress is dissatisfied with the breadth of §1983, it may, of course, revise that section, or, in creating new statutory rights it does not want subject to the provisions of that section, provide for such limitation in the particular statute. This, in fact, is precisely what Congress has done. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150, n.5 (1970).

⁶Of course, as petitioners have argued, it is this very purpose which indicates that §1983 is an "equal rights" statute within the meaning of §1343(3). (See, Petitioners' main Brief at 53-55.)

⁷Indeed, in providing for general federal question jurisdiction the very same year as in which §1983 was codified, Congress again described the grant as pertaining to cases "arising under the Constitution, laws, or treaties of the United States." Act of March 3, 1875, 18 Stat. 470, 28 U.S.C. §1331 (emphasis added). "Laws" is the term Congress uses to describe *all* federal statutes.

Respondent also takes comfort from this Court's decision in *Holt v. Indiana Manufacturing Company*, 176 U.S. 68 (1900), arguing that *Holt* construed §1983 as being applicable only to "rights secured by the Fourteenth Amendment," (Respondent's Brief at 32) by virtue of its holding that §1983 applies only to "civil rights". The claims in *Holt*, however, were both statutory and constitutional, and thus to the extent any rationale could possibly be found for its decision, it must have been based *not* on the inapplicability of §1983 to statutory rights, but on the fact that only economic rights were involved, a limitation to §1983 which this Court has since rejected in *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972). Indeed, in *Lynch* the Court rejected even this sole rationale for *Holt*, noting that *Holt* "may ... be seen as consistent with congressional restriction of federal jurisdiction in this special class of cases (challenges to the collection of a state tax), and with longstanding judicial policy," 405 U.S. at 542, n.6, not as an authoritative construction of §1343(3).⁸

B. Section 1983 Is an "Act of Congress Providing for Equal Rights. . . ." Within the Meaning of 28 U.S.C. §1343(3).

With respect to the question of the application of §1343(3) to statutory deprivations sought to be redressed under §1983, respondent characterizes petitioners' argument as "purely verbal" with "no basis in the legislative history of section 1983 or section 1343."

⁸The *Holt* opinion hardly recommends itself as a persuasive interpretation of §1983, prefacing its holding as it did by questioning whether §1983 was still in force. 176 U.S. at 72 ("Assuming (it is) still in force. . .").

(Respondent's Brief at 40). Quite to the contrary, while petitioners offer no apologies for resorting to the words Congress used to determine their effect, the fact is that what legislative history can be found (see Petitioners' Brief at 53-55) supports the view that the Congress considered §1983 to be an "Act of Congress providing for equal rights. . . ."

Respondent's principle contention seems to be that the "equal rights" language of the present §1343(3) was descriptive only of "the Civil Rights Acts passed pursuant to the enforcement clauses of the Thirteenth, Fourteenth and Fifteenth Amendments." (Respondent's Brief at 37). Precisely! But, §1983, which provides for the redress of statutory as well as constitutional rights, was itself enacted pursuant to the enforcement clause of the Fourteenth Amendment. Respondent, however, relies on the purposes of §1983 as articulated in *Monroe v. Pape*, 365 U.S. 167 (1961), for his conclusion that the Civil Rights Act was designed only "to provide a federal forum for the adjudication of those federal statutory rights that might evoke discriminatory treatment on the part of state courts." (Respondent's Brief at 41). The difficulty with this approach is that in *Monroe* the Court held that the constitutional rights protected included *all* such rights, not only those denied because of racial hostility. (*Monroe* involved an illegal search under the Fourth and Fourteenth Amendments). It seems somewhat incredible that Congress intended to restrict the application of the Act to racial discrimination when statutory rights are at stake, but not to limit its scope in the case of constitutional rights. Surely, considering the lack of logic for such a distinction, such a value judgment would have been expressed more clearly.

Respondent points to one reference in the legislative history, notes on the revisor's draft (Respondent's Brief at 36-37) which purportedly supports his restrictive interpretation of §1343(3), but on closer examination those notes (which are admittedly unclear to say the least) are supportive of petitioner's construction. Perceiving a potential misinterpretation at some future date of the 1866 and 1870 Civil Rights Acts as authorizing federal actions even where the claim in question did not arise from a deprivation of one of the enumerated rights, the revisor speculated that the 1871 Act (predecessor of §1983) which specifically created a cause of action only where the claim arose out of a deprivation of the rights protected therein, may have been intended to include within its coverage the previous rights established by the 1866 and 1870 Acts and so to clear up the ambiguity in the earlier statutes. I Revision of U.S. Statutes, Title 13, p. 64 (1872 draft). The revisor, on the other hand, feared that it might be later held that:

"only such rights as are specifically secured by the Constitution, and not *every right secured by a law authorized by the Constitution*, were here (predecessor of §1343(3)) intended. . . ." *Ibid.* (emphasis added).

If such proved the case, the phrase "secured by the Constitution" which was used in the original 1871 Act would not have covered the 1866 and 1870 Acts which were, of course, merely laws "authorized by the Constitution". Accordingly, in order to ensure that "every right secured by a law authorized by the Constitution" were covered, the revisor "deemed (it) safer to add a reference to the Civil Rights Act". *Ibid.* He did so by adding the "equal rights" clause here at issue.

Section 1983, which simultaneously was amended to include specific reference to rights secured by federal "laws", is the "Civil Rights Act" to which the revisor referred, and for which he was establishing a jurisdictional base by inserting the term "Act of Congress providing for equal rights". Only such an interpretation could guarantee that "every right secured by law authorized by the Constitution" would be covered. If the reference were only to the 1866 and 1870 Acts, as respondent would have it, only *some* rights would be protected by a grant of federal jurisdiction. Confirmatory of this interpretation is the explicit grant of jurisdiction in the district courts to hear claims to redress the deprivation of rights secured by "any law of the United States," a jurisdictional grant which, if consistent with the original 1871 Act, would have been concurrent with the circuit court's jurisdiction. Indeed, the revisor's belief that the 1871 Act as originally enacted already provided, by virtue of the phrase "secured by the Constitution," redress for deprivation of rights secured by federal statutes which were authorized by the Constitution, coupled with his uncertainty as to judicial acceptance of his construction, probably formed the basis for his explicit reference to "laws" in the 1875 codification. (See Point 2-A, *supra*). Congress' acceptance of that apparent "expansion" of the 1871 Act without comment can be understood best in that context, i.e., the revisor's belief was correct.⁹

⁹In this regard, petitioners stand by their interpretation of the original 1871 Act as providing protection for federal statutory rights by virtue of the Fourteenth Amendment's privileges and immunities clause. (Petitioners' Brief, at 36, n. 24). Contrary to respondent's characterization of the *Slaughterhouse Cases*, 16 Wall 36 (1872), in those cases the Court rejected only the claim that

Finally, respondent bolsters his argument with a linguistic appeal of his own. He argues that if §1983 is an "equal rights" statute for purposes of §1343(3), then "laws" as used in §1983 must also be so limited and, therefore, deprivations of rights under the Social Security Act are not covered by §1983. This misses the point. Section 1983 is an equal rights statute because it guarantees to all persons the equal opportunity to enforce their federal rights by providing a federal judicial remedy to redress deprivations of those rights whether constitutional or statutory. Section 1983 thus provides for equality before the law regardless of the nature of the underlying substantive right which triggers a §1983 action.

"fundamental rights" were protected by the privileges and immunities clause, but held that the privileges and immunities to be secured from state infringement were those "limited class of interests growing out of the relationship between the citizen and the national government created by the Constitution and *federal laws*." *Hague v. CIO*, 307 U.S. 496, 520, n. 1 (1939) (Stone, concurring) (emphasis added). While even some rights secured by the Constitution would not be covered by the privileges and immunities clause because they were derived from the common law and did not owe their existence to the national government, *Ibid*, new rights and obligations created by federal statutes do wholly owe their existence to the establishment of the federal government. Cf. *United States v. Waddell*, 112 U.S. 76 (1884). Section 1983, then, was enacted in part to enforce the privileges and immunities clause of the Fourteenth Amendment and the phrase, "privileges and immunities secured by the Constitution" used in the original 1871 Act (and still used in §1343(3)) describes federal statutory rights created by the Congress.

C. Section 1983 Is an "Act of Congress Providing for the Protection of Civil Rights. . ."

It is not entirely clear whether respondent resists §1343(4) jurisdiction in this case on the basis that rights secured by federal statutes (as opposed to the Constitution) are not "civil rights," or that §1343(4), despite its unambiguous terms, does not afford jurisdiction for cases other than voting rights cases, or of some combination of these arguments.¹⁰ In any event, these arguments miss the mark.

There can be no serious doubt that rights created by statute, capable of being enforced in a civil action at the behest of a person aggrieved by nonenforcement, are "civil rights". (See, Petitioners' Brief, at 37-39). Such rights are precisely those which the 1866, 1870 and 1871 Civil Rights Acts were designed to protect by creating new federal civil and criminal remedies for state deprivations of federal statutory, as well as constitutional rights. In addition to §1983, see, for example, 18 U.S.C. §§241, 242, the criminal civil rights statutes which impose their penalties for interference with federal statutory rights.

Respondent's view (Respondent's Brief at 42) that an interpretation of §1983 which includes the protection of statutory rights renders 28 U.S.C. §1331 meaningless, ignores the plain fact that §1983 applies only in cases of state action. Hence, §1343(4), *when used with §1983*, would similarly require action under color of state law, leaving to §1331 and its jurisdictional amount requirement other federal question cases in which there is no

¹⁰Respondent does not appear to dispute the obvious that §1983 is an "Act of Congress providing for the protection of civil rights. . ." See, *Moor v. County of Alameda*, 93 S.Ct. 1785, 1792, n. 13.

state action. See *Lynch v. Household Finance Corp.*, 405 U.S. 538, 546 (1972). Indeed, since §1331 includes not only cases arising under the "laws", but those arising under the "Constitution" as well, and since concededly all constitutional rights are protected by §1983, respondent's argument, if accepted, would have §1983 read out of existence in order to avoid overlap with §1331.

Respondent urges, however, that the House Report's reference to the "technical" nature of §1343(4) robs it of the meaning its plain language would naturally give to it. Our main brief shows why the description as "technical" is an unreliable interpretation of Congress' action. (See Petitioner's Brief at 42-47).¹¹ Respondent offers nothing in response, preferring instead to stand on the assertion of technicality without even acknowledging that even a technical provision must have some meaning. Respondent offers us none however, for the specific reference in §1343(4) to statutes protecting "civil rights". Indeed, respondent's reliance on the House Report is undercut by his own admission that §1343(4) was drawn so as not to require state action (Respondent's Brief at 52), necessarily an admission of the importance of §1343(4) as a new jurisdictional grant to the federal courts, and an acknowledgement that the "technical" amendment does indeed extend federal court power in a monumental way.

Required to find some meaning for §1343(4), respondent suggests it is restricted to voting rights cases.

¹¹Petitioners showed that the "preceding section" to which §1343(4) was alleged to conform was not enacted, that statutory jurisdiction already existed over the type of action which that section would have authorized, and that a specific jurisdictional grant dealing with that section was elsewhere included in the bill.

While concern with voting rights was indeed paramount, Congress provided for federal court jurisdiction over claims under statutes "protecting civil rights, including the right to vote," *not* just to statutes "protecting the right to vote". Moreover, apart from the plain language of the provision stands the fact that the proponent of the "compromise" leaving § 1343(4) intact, himself told the Senate "(t)here is a definite difference between the right to vote and other civil rights". 103 Cong. Rec. 12560 (1957). While this remark came in the context of a speech urging the importance of voting rights, and the Case "compromise", it underscores the awareness of the Congress of its choice of sweeping language in § 1343(4).

The Court should have no difficulty enforcing the clear language of § 1343(4) merely because it was inserted and advanced in the Congress without great fanfare as to its importance to non-voting rights cases. The legislative process, and its give and take, do not always leave us with the precise instructions we might prefer. Given the prevalent assumption during the debate that *individuals* already had the power, now proposed for the Attorney General, to go to federal court to obtain injunctions against the denial of all of their civil rights, see, e.g., 103 Cong. Rec. 12080, 12083, 12097, 12558, it is a plausible explanation for the abstruse debate on § 1343(4) that many Congressmen believed that claims such as the one in this case could already be brought in district court. As Sen. Case noted, § 1343(4) would "clarify the jurisdiction of the district court in the entertainment of suits . . . under any act of Congress providing for the protection of civil rights, including the right to vote." 103 Cong. Rec. 12559 (1957). Those assumptions were, in our view, correct, see our arguments on § 1343(3), but in any case

the Court cannot fail to enforce Congressional efforts to clear up the ambiguity with a clear statutory provision.

Finally, respondent purports to have found explicit evidence that Congress did not intend suits such as the one at bar to come within §1343(4), despite its unequivocal language. He relies principally on statements by Senators Aiken and Javits (Respondent's Brief at 49, 50) which he says indicate that §1343(4) "has nothing to do with social security". (Respondent's Brief at 52). Our reading of these statements, and the context in which they were made, persuades us that they had no relevance whatsoever to §1343(4), and were applicable only to the rest of Part III of the bill. A brief review of the debates is in order.

As noted in both main briefs, Part III of H.R. 6127, as passed by the House, included two sections. Section 121 added two new paragraphs to 42 U.S.C. §1985 which authorized the Attorney General to commence civil actions to prevent the deprivation of rights protected by that statute. Section 122 added §1343(4). Except for a few specific references to §122, the entire debate on Part III focused on the new powers it would give the Attorney General. Arguments were made that it would deprive defendants of the right to jury trial, e.g., 103 Cong. Rec. 12087-89 (1957), that it would violate the important principle of "home rule" and weaken the authority of and respect for state and local officials, e.g., *id.* at 12283, 12541, and in sum, that it would potentially lead to abuse of power by a future Attorney General, e.g., *id.* at 11981.

Proponents of §121 emphasized that it created no new rights but merely established additional remedies for enforcement of existing rights. *Id.* at 12081, 12545. It was emphasized that the Federal Government (i.e., the

Executive) already exercised criminal power in these areas. E.g. *id.* at 12090. Statements such as those by Sen. Neuberger that "part III . . . does not add any substantive law or extend federal jurisdiction in the field of civil rights," *id.* at 12545, may thus be seen as referring to the proposed grant of power to the Attorney General to file civil suits in cases over which he already had criminal jurisdiction, *not* to the subject matter jurisdiction of United States Courts which, of course, is precisely what § 1343(4) relates to. Indeed, during this entire debate reference was made loosely to "Part III," *not* specifically to § 121, which, because of the Attorney General's proposed powers, was the cause for Congressional concern over Part III.

Thus, even *after* Senator Case offered his amendment to retain § 122 and strike only § 121 (*id.* at 11980), making that the pending business, the debate continued to focus on "Part III," the short-hand description of § 121, e.g., *id.* at 11981 (Aiken, Lausche). It is in that context that Sen. Aiken expressed fear that "Part III" could go into the matter of social security, and that it might result in the Federal Government undertaking to force uniform State laws so far as social security and unemployment payments were concerned." *Ibid.* That fear, and Sen. Javits' rejoinder that "Part III (will not) lead the Federal Government into all the fields enumerated," *id.* at 12077, relates *not* to § 122 (and § 1343(4)), but to § 121 and the Attorney General authorization. As Sen. Javits noted, "*the United States* has many other powers in respect to the wages and hours law and in respect to other Federal statutes, and it does not need this law for that purpose (i.e. to intrude into the areas described by Sen. Aiken)." *Id.* at 12077 (emphasis added).

Of course, Sen. Javits' view that §121 would not lead the Executive into the areas set forth by Sen. Aiken was correct since §1985, to which §121 would add the new grant of power, applies only to specific substantive rights, namely, the right to hold public office, 42 U.S.C. §1985(1), the right to give testimony, 42 U.S.C. §1985(2), and the right to equal protection of the laws, 42 U.S.C. §1985(3). General protection is not given under §1985 for *all* civil rights such as is afforded by §1983, and the new proposed power of the Attorney General indeed would not therefore extend Executive action to any federal statutory rights, including social security and unemployment compensation. These exchanges do not support the contention that the Senate feared and debated petitioners' construction of §1343(4). The Court should enforce §1343(4) as it reads, and as it was intended to read.

CONCLUSION

THE COURT SHOULD HOLD THAT THE DISTRICT COURT HAD JURISDICTION TO DETERMINE THE MERIT OF PETITIONERS' CLAIMS. THE JUDGMENT OF THE COURT BELOW SHOULD BE REVERSED AND THE CASE REMANDED WITH APPROPRIATE DIRECTIONS.

Respectfully submitted,

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(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Edison Co.*, 398 U.S. 271, 287.

SUPREME COURT OF THE UNITED STATES

Syllabus

HAGANS ET AL. v. LAVINE, COMMISSIONER, NEW YORK DEPARTMENT OF SOCIAL SERVICES, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 72-6476. Argued December 11, 1973—

Decided March 25, 1974

Petitioners, recipients of public assistance under the federal-state Aid to Families with Dependent Children (AFDC) program, brought this action under 42 U. S. C. § 1983 challenging a New York regulation permitting the State to recoup prior unscheduled payments for rent from subsequent grants under the AFDC program, on the ground that the regulation violated the Equal Protection Clause of the Fourteenth Amendment and conflicted with the Social Security Act and implementing regulations of the Department of Health, Education, and Welfare (HEW). Injunctive and declaratory relief was sought and jurisdiction was invoked under 28 U. S. C. § 1343 (3) and (4). The District Court declared the recoupment regulation contrary to the Social Security Act and HEW regulations and enjoined its implementation or enforcement. The Court of Appeals reversed, holding that because petitioners had failed to present a substantial constitutional claim, the District Court lacked jurisdiction to entertain either the equal protection or the statutory claim. *Held*:

1. The District Court had jurisdiction under 28 U. S. C. § 1343 (3). Pp. 6-14.

(a) Section 1343 (3) conferred jurisdiction to entertain the constitutional claim if it was of sufficient substance to support federal jurisdiction, in which case, the District Court could hear as a matter of pendent jurisdiction the claim of conflict between federal and state law, without determining that the latter claim in its own right was encompassed within § 1343. P. 7.

HAGANS v. LAVINE

Syllabus

(b) Within the accepted substantiality doctrine, petitioners' complaint alleged a constitutional claim sufficient to confer jurisdiction on the District Court to pass on the controversy, since (1) the complaint alleged a deprivation, under color of state law, of constitutional rights within the meaning of §§ 1343 (3) and 1983; (2) the equal protection issue was neither frivolous nor so insubstantial as to be beyond the District Court's jurisdiction, and the challenged regulation was not so clearly rational as to require no meaningful consideration; and (3) the cause of action alleged was not so patently without merit as to justify a dismissal for want of jurisdiction, *Bell v. Hood*, 327 U. S. 678, whatever may be the ultimate resolution of the federal issues on the merits. Pp. 8-14.

2. Given a constitutional question over which the District Court had jurisdiction, it also had jurisdiction over the "statutory" claim. The latter claim was to be decided first and could be decided by the single district judge, while the constitutional claim could be adjudicated only by a three-judge court and only if the statutory claim was previously rejected. Pp. 14-16.

3. State law claims pendent to federal constitutional claims conferring jurisdiction on a district court generally are not to be dismissed. Given advantages of economy and convenience and no unfairness to litigants, they are to be adjudicated, particularly where they may be dispositive and their decision would avoid adjudication of federal constitutional questions. There are special reasons to adjudicate the pendent claim where, as here, the claim, although called "statutory," is in reality a constitutional claim arising under the Supremacy Clause, since "federal courts are particularly appropriate bodies for the application of pre-emption principles." *United Mine Workers v. Gibbs*, 383 U. S. 715, 729. Pp. 16-21.

471 F. 2d 347, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, MARSHALL, and BLACKMUN, JJ., joined. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and POWELL, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 72-8476

Cynthia Hagans et al.,
Petitioners,

v.

Abe Lavine, Commissioner
of New York State De-
partment of Social
Services, et al.

On Writ of Certiorari to the
United States Court of
Appeals for the Second
Circuit.

[March 25, 1974]

MR. JUSTICE WHITE delivered the opinion of the Court.

Petitioners, recipients of public assistance under the cooperative federal-state Aid to Families With Dependent Children (AFDC) program,¹ brought this action in

¹ AFDC is one of several major categorical public assistance programs established by the Social Security Act of 1935, and as we described in *King v. Smith*, 392 U. S. 309, 316-317 (1968), it is founded on a scheme of cooperative federalism:

"It is financed largely by the Federal Government, on a matching fund basis, and is administered by the States. States are not required to participate in the program but those which desire to take advantage of the substantial federal funds available for distribution to needy children are required to submit an AFDC plan for the approval of the Secretary of Health, Education, and Welfare (HEW). 49 Stat. 627, 42 U. S. C. §§ 601, 602, 603, and 604. See [U. S. Advisory Commission Report on Intergovernmental Relations, Statutory and Administrative Controls Associated with Federal Grants for Public Assistance 21-23 (1964)]. The plan must conform with several requirements of the Social Security Act and with rules and regulations promulgated by HEW. 49 Stat. 627, as amended, 42

the District Court for themselves and their infant children and as representatives of other similarly situated AFDC recipients. Their suit challenged a provision of the New York Code of Rules and Regulations permitting the State to recoup prior unscheduled payments for rent from subsequent grants under the AFDC program.² They alleged that the recoupment regulation violated the

U. S. C. § 602 (1964 ed., Supp. II). See also HEW, Handbook of Public Assistance, pt. IV, §§ 2300, 2300"

See also *Rosado v. Wyman*, 397 U. S. 397, 407-409 (1970).

Under the Social Security Act, HEW withholds federal funds for implementation of a state AFDC plan until compliance with the Act and the Department's regulations. HEW may also terminate partially or entirely federal payments if "in the administration of the [state] plan there is a failure to comply substantially with any provision required by section 602 (a) of [the Act] to be included in the plan." 42 U. S. C. § 604. See *King v. Smith*, *supra*, 392 U. S., at 317 n. 12; *Rosado v. Wyman*, *supra*, 397 U. S., at 420-422.

² The challenged regulation provides, in pertinent part:

"(g) *Payment for services and supplies already received.* Assistance grants shall be made to meet only current needs. Under the following specified circumstances payment for services or supplies already received is deemed a current need:

"(7) For a recipient of public assistance who is being evicted for nonpayment of rent for which a grant has been previously issued, an advance allowance may be provided to prevent such eviction or rehouse the family; and such advance shall be deducted from subsequent grants in equal amounts over not more than the next six months. When there is a rent advance for more than one month, or more than one rent advance in a 12-month period, subsequent grants for rent shall be provided as restricted payments in accordance with Part 381 of this Title." 18 N. Y. C. R. R. § 352.7 (g) (7).

As AFDC recipients, petitioners receive monthly grants calculated to provide 90% of their family needs for shelter, fuel, and other basic necessities. For one reason or another, each petitioner was unable to pay her rent, and faced with imminent eviction, she received emergency rent payments from the Nassau County Department of Social Services. Because the State characterized these payments as "advances," the amount of these disbursements was

Equal Protection Clause of the Fourteenth Amendment and contravened the pertinent provisions of the Social Security Act governing AFDC and the regulations promulgated thereunder by the administering federal agency, the Department of Health, Education, and Welfare (HEW).³ The action sought injunctive and declaratory

deducted or recouped from petitioners' subsequent monthly familial assistance grants pursuant to § 352.7 (g) (7).

* Petitioners alleged that the New York State recoupment regulation was contrary to the following provisions of the federal statute and regulations because it assumed, contrary to fact, that those funds extended to a recipient to satisfy a current emergency rent need remain available as income for the family's need during the mandated six-month recoupment period.

42 U. S. C. § 602 (a) (7) and (a) (10):

"(a) A State plan for aid and services to needy families with children must:

"(7) except as may be otherwise provided in clause (8), provide that the [administering] State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or any other individual (living in the same house as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income"

"(10) provide, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals"

45 CFR § 233.20 (a) (3) (ii) (c):

"(a) *Requirements for State Plans.* A State Plan for OAA, AFDC, AB, APTD or AABD must as specified below:

"(3) (ii) Provide that, in establishing financial eligibility and the amount of the assistance payment:

relief pursuant to 42 U. S. C. § 1983 and 28 U. S. C. § 2201, and jurisdiction was invoked under 28 U. S. C. § 1343 (3) and (4). The District Court found that the equal protection claim was substantial and provided a basis for pendent jurisdiction to adjudicate the so-called "statutory" claim—the alleged conflict between state and federal law. After hearing, the trial court declared the recoupment regulation contrary to the Social Security Act and HEW regulations and enjoined its implementation or enforcement. — F. Supp. — (EDNY 1972). Following a remand,⁴ the Court of Appeals reversed, holding that because petitioners had failed to present a substantial constitutional claim, the District Court lacked jurisdiction to entertain either the equal protection or the statutory claim. *Hagans v. Wyman*, 471 F. 2d 347

"(c) only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered"

"On appeal from the District Court's entry of the injunction, the Court of Appeals without extended discussion found jurisdiction for the § 1983 action under 28 U. S. C. § 1343 (3). Without passing on the merits of the District Court's findings and conclusions, the Court of Appeals, with one judge dissenting, ordered a remand to the trial court to determine whether the recoupment of prior advance rent payments from current grants is a "reduction in grant" that would trigger the New York fair hearing procedures under 18 N. Y. C. R. R. § 351.26. *Hagans v. Wyman*, 462 F. 2d 928 (CA2 1972).

On remand the District Court allowed additional parties who had received fair hearings to intervene and file a complaint. At the invitation of the court, HEW filed an *amicus curiae* brief which concluded that "the New York Regulation contravenes federal requirements because it assumes for particular months the existence of income and resources which by definition are not currently available for such months." Brief of Petitioners, at App. 2. The District Court once again held the recoupment regulation invalid as violative of the Social Security Act and HEW regulations and enjoined its enforcement and implementation.

(CA2 1973). The jurisdictional question being an important one, we granted certiorari. — U. S. —. For reasons set forth below, we hold that the District Court had jurisdiction under 28 U. S. C. § 1343 (3) to consider petitioners' attack on the recoupment regulation.*

*In view of our disposition of this case, we do not reach the question whether wholly aside from the pendent jurisdiction rationales relied upon by the District Court, other valid grounds existed for sustaining its jurisdiction to entertain and decide the claim of conflict between federal and state law. It has been suggested, for example, that the conflict question is itself a constitutional matter within the meaning of § 1343 (3). *Connecticut Union of Welfare Employees v. White*, 55 F. R. D. 481, 486 (Conn. 1972). For purposes of interpreting and applying 28 U. S. C. § 2281, the three-judge court provision, a claim of conflict between federal and state law has been denominated a claim not requiring a three-judge court. *Swift v. Wickham*, 382 U. S. 111 (1965). But *Swift* itself recognised that a suit to have a state statute declared void and to secure the benefits of the federal statute with which the state law is allegedly in conflict cannot succeed without ultimate resort to the Federal Constitution—"to be sure any determination that a state statute is void for obstructing a federal statute does rest in the Supremacy Clause of the Federal Constitution." 382 U. S., at 125. Moreover, when we have previously determined that state AFDC laws do not conform with the Social Security Act or HEW regulations, they have been invalidated under the Supremacy Clause. See *Townsend v. Swank*, 404 U. S. 282, 286 (1971). It is therefore urged that the "secured by the Constitution" language of § 1343 (3) should not be construed to exclude Supremacy Clause issues. That question we leave for another day.

Petitioners contend that § 1983 authorizes suits to vindicate rights under the "laws" of the United States as well as under the Constitution and that a suit brought under § 1983 to vindicate a statutory right under the Social Security Act, is a suit under an Act of Congress "providing for the protection of civil rights, including that right to vote" within the meaning of § 1343 (4). They further argue that in any event, § 1343 (3) in particular, and § 1343 in general, should be construed to invest the district courts with jurisdiction to hear any suit authorized by § 1983. These issues we

Petitioners brought this action under 42 U. S. C. § 1983, which provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured

also do not reach. See *Rosado v. Wyman*, *supra*, 397 U. S., at 405 n. 7; see also *Herser*, *Federal Jurisdiction Over Statutorily-Based Welfare Claims*, 6 *Harv. Civ. Rights-Civ. Lib. L. Rev.* 1, 16-18 (1970). Note, *Federal Jurisdiction Over Challenges to State Welfare Programs*, 72 *Col. L. Rev.* 1404, 1405-1435 (1972). Note, *Federal Judicial Review of State Welfare Practices*, 67 *Col. L. Rev.* 84, 109-115 (1967).

Several past decisions of this Court concerning challenges by federal categorical assistance recipients to state welfare regulations have either assumed that jurisdiction existed under § 1343 or so stated without analysis. See, e. g., *Carleson v. Remillard*, 406 U. S. 598 (1972); *Carter v. Stanton*, 405 U. S. 669, 671 (1972); *Townsend v. Swank*, 404 U. S. 282, 284 n. 2 (1971); *California Human Resources Dept. v. Java*, 402 U. S. 121 (1971); *Dandridge v. Williams*, 397 U. S. 471 (1970); *Goldberg v. Kelly*, 397 U. S. 254 (1970); *King v. Smith*, *supra*, 392 U. S., at 312 n. 3; *Damico v. California*, 389 U. S. 416 (1967). In none of these cases was the jurisdictional issue squarely raised as a contention in the petitions for certiorari, jurisdictional statements or briefs filed in this Court. See *Edelman v. Jordan*, — U. S. —, —. Moreover, when questions of jurisdiction have passed in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us. *United States v. More*, 3 Cranch 159, 172 (1805); *King Mfg. Co. v. Augusta*, 277 U. S. 100, 134-135 n. 21 (1928) (Brandeis, J., dissenting). We therefore approach the question of the District Court's jurisdiction to entertain this suit as an open one calling for a canvass of the relevant jurisdictional considerations. *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, *supra*, 362 U. S., at 88 (1960) (Frankfurter, J., dissenting).

in an action at law, suit in equity, or other proceeding for redress."

By its terms, § 1983 embraces petitioners' claims that the challenged regulation enforced by respondent state and county welfare officials deprives them of a right "secured by the Constitution and laws," viz., the equal protection of the laws. But the federal cause of action created by the section does not by itself confer jurisdiction upon the Federal District Courts to adjudicate these claims. Accordingly, petitioners relied principally upon 28 U. S. C. § 1343 (3):

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

"(3) To redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States"

Concededly, § 1983 authorizes a civil action to "redress the deprivation, under color of any State . . . regulation . . . of any right . . . secured by the Constitution of the United States." Section 1343 (3) therefore conferred jurisdiction upon the District Court to entertain the constitutional claim if it was of sufficient substance to support federal jurisdiction. If it was, it is also clear that the District Court could hear as a matter of pendent jurisdiction the claim of conflict between federal and state law, without determining that the latter claim in its own right was encompassed within § 1343. *Rosado v. Wyman*, *supra*, 397 U. S., at 402-405; see also *N. Y. Dept. of Social Services v. Dublino*, 413 U. S. 405, 412 n. 11 (1973).

The Court of Appeals ruled that petitioners had not tendered a substantial constitutional claim and ordered dismissal of the entire action for want of subject matter jurisdiction. The principle applied by the Court of Appeals—that a “substantial” question was necessary to support jurisdiction—was unexceptionable under prior cases. Over the years the Court has repeatedly held that the federal courts are without power to entertain claims otherwise within their jurisdiction if they are “so attenuated and unsubstantial as to be absolutely devoid of merit,” *Newburyport Water Co. v. Newburyport*, 193 U. S. 561, 579 (1904); “wholly insubstantial,” *Bailey v. Patterson*, 369 U. S. 31, 33 (1962); “obviously frivolous,” *Hannis Distilling Co. v. Baltimore*, 216 U. S. 285, 288 (1910); “plainly unsubstantial,” *Levering & G. Co. v. Morrin*, 289 U. S. 103, 105 (1933); or “no longer open to discussion,” *McGilvra v. Ross*, 215 U. S. 70, 80 (1909). One of the principal decisions on the subject, *Ex parte Poresky*, 290 U. S. 30, 31–32 (1933), held, first, that “[i]n the absence of diversity of citizenship, it is essential to jurisdiction that a substantial federal question be presented”; second, that a three-judge court was not necessary to pass upon this initial question of jurisdiction; and third, that “[t]he question may be plainly unsubstantial, either because it is ‘obviously without merit’ or because ‘its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.’” *Levering & Garrigues Co. v. Morrin*, *supra*; *Hannis Distilling Co. v. Baltimore*, 216 U. S. 285, 288; *McGilvra v. Ross*, 215 U. S. 70, 80.”

Only recently this Court again reviewed this general question where it arose in the context of convening a three-judge court under 28 U. S. C. § 2281:

“‘Constitutional insubstantiality’ for this purpose

has been equated with such concepts as 'essentially fictitious,' *Bailey v. Patterson*, 369 U. S., at 33; 'wholly insubstantial,' *ibid.*; 'obviously frivolous,' *Hannis Distilling Co. v. Baltimore*, 216 U. S. 285, 288 (1910); and 'obviously without merit,' *Ex parte Poresky*, 290 U. S. 30, 32 (1933). The limiting words 'wholly' and 'obviously' have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U. S. C. § 2281. A claim is insubstantial only if "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." *Ex parte Poresky*, *supra*, at 32, quoting from *Hannis Distilling Co. v. Baltimore*, *supra*, at 288; see also *Levering & Garrigues Co. v. Morrin*, 289 U. S. 103, 105-106 (1933); *McGilvra v. Ross*, 215 U. S. 70, 80 (1909). *Goosby v. Osser*, 409 U. S. 512, 518 (1973).

The substantiality doctrine as a statement of jurisdictional principles affecting the power of a federal court to adjudicate constitutional claims has been questioned, *Bell v. Hood*, 327 U. S. 678, 683 (1946), and characterized as "more ancient than analytically sound," *Rosado v. Wyman*, *supra*, 397 U. S., at 404. But it remains the federal rule and needs no reexamination here, for we are convinced that within accepted doctrine petitioners' complaint alleged a constitutional claim sufficient to confer jurisdiction on the District Court to pass on the controversy.

Jurisdiction is essentially the authority conferred by Congress to decide a given type of case one way or the other. *The Fair v. Kohler Die Co.*, 228 U. S. 22, 25 (1913). Here, §§ 1843 (3) and 1983 unquestionably authorized federal courts to entertain suits to redress the deprivation, under color of state law, of constitutional rights. It is also plain that the complaint formally alleged such a deprivation. The District Court's jurisdiction, a matter for threshold determination, turned on whether the question was too insubstantial for consideration.

In *Dandridge v. Williams*, *supra*, AFDC recipients challenged the Maryland maximum grant regulation on equal protection grounds. We held that the issue should be resolved by inquiring whether the classification had a rational basis. Finding that it did, we sustained the regulation. But *Dandridge* evinced no intention to suspend the operation of the Equal Protection Clause in the field of social welfare law. State laws and regulations must still "be rationally based and free from invidious discrimination." 397 U. S., at 487. See *Jefferson v. Hackney*, 406 U. S. 535, 546 (1972); *Carter v. Stanton*, *supra*, 405 U. S., at 671; cf. *San Antonio School District v. Rodriguez*, 411 U. S. 1 (1973).

Judged by this standard, we cannot say that the equal protection issue tendered by the complaint was either frivolous or so insubstantial as to be beyond the jurisdiction of the District Court. We are unaware of any cases in this Court specifically dealing with this or any similar regulation and settling the matter one way or the other.* Nor is it immediately obvious to us from the

* Those District Courts that have ruled on similarly drafted state recoupment provisions have found that they were not rationally related to the declared purposes of the AFDC program and were therefore invalid under the Social Security Act and HEW regulations. In *Cooper v. Laupheimer*, 316 F. Supp. 264 (ED Pa.

face of the complaint that recouping emergency rent payments from future welfare disbursements, which appellants argue deprived needy children because of parental

1970), the District Court, after finding the equal protection claim substantial, invalidated a Pennsylvania regulation that recouped over a two-month period alleged overpayments from a family's assistance grants. The court found the regulation inconsistent with the Social Security Act for several reasons, including, *inter alia*, the punishment of the dependent child by depriving him of a substantial amount of his AFDC assistance because his mother either mistakenly or fraudulently obtained an extra payment months ago. "[T]he state cannot justify its [arbitrary] method of restitution by asserting that proper management of funds would produce a [cash] reserve. The State cannot permit a child to be starved or be deprived of aid that he needs because of the mother's budgetary mismanagement. The Social Security Act specifies remedies for such a situation . . ." *Id.*, at 269.

In *Bradford v. Juras*, 331 F. Supp. 167 (Ore. 1971), the District Court found that it had subject matter jurisdiction over the constitutional and statutory challenge to an Oregon regulation authorizing recoupment of overpayments from current assistance grants. Measuring the regulation against the goals of the AFDC program, the court invalidated it as inconsistent with federal law.

"The primary concern of Congress in establishing the AFDC program was the welfare and protection of the needy dependent child. 42 U. S. C. § 601; *King v. Smith*, 392 U. S. 309, 313 . . . (1968). This concern is thwarted when recoupment from current grants takes money from the child to penalize the misconduct of its parent.

" . . . The child-oriented policy of the AFDC program requires that children with equal needs be treated equally. The fact that a parent-recipient has acted wrongfully in the past by withholding information does not justify reducing the subsistence level of her children below that of other needy children." 331 F. Supp., at 170.

In *Holloway v. Parham*, 340 F. Supp. 336 (ND Ga. 1972), an equal protection and due process challenge to a Georgia statute mandating recoupment from future grants for past unlawful payments was deemed substantial enough to warrant the convening of a three-judge court. Addressing the pendent claim of inconsistency with the Social Security Act and HEW regulations, the court ruled that the law was valid because it required a prerecoupment de-

default, was so patently rational as to require no meaningful consideration.

The Court of Appeals rightly felt obliged to measure petitioner's complaint that the challenged regulation violated the Equal Protection Clause "by discriminating irrationally and invidiously between different classes of recipients" against the standard prescribed by *Dandridge*. The Court of Appeals then reasoned that without the recoupment regulation, those who were subject to it would be preferred over those who had paid their full rent out of their normal monthly grant. The court further reasoned that the regulation provided an incentive for welfare recipients to properly manage their grants and not become delinquent in their rent.² It concluded that

termination that all or part of the overpayments are currently available to the parent and the children.

Although it did not explore the question in depth, the first Court of Appeals panel in this case that passed upon the injunction found jurisdiction in the District Court pursuant to 28 U. S. C. § 1343 (3) on the authority of the Court's decision in *Carter v. Stanton*, *supra*. There we noted in a suit challenging a state welfare regulation that "if the federal [district] court's characterization of the [Fourteenth Amendment] question presented as insubstantial was based on the face of the complaint, as it seems to have been, it was error." 405 U. S., at 671. The dissent did not question the majority's jurisdictional determination. *Hagans v. Wyman*, *supra*, 462 F. 2d, at 930-931, 932.

¹ App., at 5.

² "The regulation in question, 18 NYCRR § 352.7 (g) (7), has a rational basis. Since the state has a limited amount of funds available to allocate to welfare recipients, the recoupment regulation is reasonably designed to ensure that there are sufficient funds available to all recipients on the level set by the state legislature. By receiving the advance payment plaintiffs have gotten more than the normal grant. Without the recoupment regulation, the plaintiffs would be in a preferred position over all other welfare recipients who have paid their full rent out of the normal grant. The purposes of equal protection are served by treating all alike without granting special favor to those who have misappropriated their rent

the regulation was rationally based and that no substantial constitutional question within the jurisdiction of the District Court had been presented.

This reasoning with respect to the rationality of the regulation and its propriety under the Equal Protection Clause may ultimately prove correct, but it is not immediately obvious from the decided cases or so "very plain" under the Equal Protection Clause. We think the admonition of *Bell v. Hood, supra*, should be followed here:

"Jurisdiction . . . is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dis-

allowance. If there were no recoupment provision, there would be a disincentive for welfare recipients to manage their grants so as to have funds available to pay their rent each month. The recoupment provision encourages proper money management, an entirely acceptable, if incidental, purpose of the welfare legislation.

"No doubt there are other ways in which the state could accomplish the ends served by the use of the recoupment regulation. However, it is not for us to evaluate the wisdom of the state's choice of means. If these means are rationally related to a proper end, as they are in this case, we have no power to go further." 471 F. 2d, at 349-350.

* *Hart v. Keith Exchange*, 262 U. S. 271, 274 (1923).

dismissal of the case would be on the merits, not for want of jurisdiction." 327 U. S., at 682 (citations omitted).¹⁹

As was the case in *Bell v. Hood*, we cannot "say that the cause of action alleged is so patently without merit as to justify, even under the qualifications noted, the court's dismissal for want of jurisdiction." 327 U. S., at 683. Nor can we say that petitioners' claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court, whatever may be the ultimate resolution of the federal issues on the merits." *Oneida Indian Nation v. County of Oneida*, — U. S. —, — (1974). (Citations omitted.)

II

Given a constitutional question over which the District Court had jurisdiction, it also had jurisdiction over the "statutory" claim. See *ante*, at 7. The latter was to be decided first and the former not reached if the statutory claim was dispositive. *California Human Resources Department v. Java*, 402 U. S. 121, 124 (1971); *Dandridge v. Williams*, *supra*, 397 U. S., at 475-476; *Rosado v. Wyman*, *supra*, 397 U. S., at 402; *King v. Smith*, *supra*. The constitutional claim could be adjudicated only by a three-judge court, but the statutory claim was within the jurisdiction of a single district judge. *Swift & Co. v. Wickham*, *supra*; *Rosado v. Wyman*, *supra*, 397

¹⁹ Once a federal court has ascertained that a plaintiff's jurisdiction-conferring claims are not "insubstantial on their face," *Engineers v. Chicago, R. I. & P. R. Co.*, 382 U. S. 423, 428 (1966), "no further consideration of the merits of the claim[s] [are] relevant to a determination of the court's jurisdiction of the subject matter." *Baker v. Carr*, 369 U. S. 186, 199 (1962).

U. S., at 403. Thus, the District Judge, sitting alone, moved directly to the statutory claim. His decision was appealed to the Courts of Appeals, although had a three-judge court been convened, an injunction issued, and the statutory ground alone decided, the appeal would be only to this Court under 28 U. S. C. § 1253.

The procedure followed by the District Court—initial determination of substantiality and then adjudication of the “statutory” claim without convening a three-judge court—may appear at odds with some of our prior decisions. See, e. g., *Engineers v. Chicago, R. I. & P. R. Co.*, *supra*; *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, *supra*. But, we think it accurately reflects the recent evolution of three-judge court jurisprudence, “this Court’s concern for efficient operation of the lower federal courts” and “the constrictive view of the three-judge court jurisdiction which this Court has traditionally taken.” *Swift & Co. v. Wickham*, *supra*, 382 U. S., at 128, 129 (citations omitted). In *Rosado v. Wyman*, *supra*, 397 U. S., at 403, we suggested that

“[e]ven had the constitutional claim not been declared moot, the most appropriate course may well have been to remand to the single district judge for findings and the determination of the statutory claim rather than encumber the district court, at a time when district court calendars are overburdened, by consuming the time of three federal judges in a matter that was not required to be determined by a three-judge court. See *Swift & Co. v. Wickham*, 382 U. S. 111 (1965).”

It is true that the constitutional claim would warrant convening a three-judge court and that if a single judge rejects the statutory claim, a three-judge court must be called to consider the constitutional issue. Neverthe-

less, the coincidence of a constitutional and statutory claim should not automatically require a single-judge district court to defer to a three-judge panel, which, in view of what we have said in *Rosado v. Wyman*, *supra*, could then merely pass the statutory claim back to the single-judge. See *Kelly v. Illinois Bell Telephone Co.*, 325 F. 2d 148, 151 (CA7 1963); *Chicago, Duluth & Georgian Bay Transit Co. v. Nims*, 252 F. 2d 317, 319-320 (CA6 1958); *Doe v. Lavine*, 347 F. Supp. 357, 359-360 (SDNY 1972); cf. *Bryant v. Carlson*, 444 F. 2d 353, 358-359 (CA9 1971). "In fact, it would be grossly inefficient to send a three-judge court a claim which will only be sent immediately back. This inefficiency is especially apparent if the single judge's decision resolves the case, for there is then no need to convene the three-judge court." *Norton v. Richardson*, 352 F. Supp. 596, 599 (Md. 1972) (citations omitted). Section 2281 does not forbid this practice, and we are not inclined to read that statute "in isolation with mutilating literalness . . ." *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, *supra*, 362 U. S., at 94 (Frankfurter, J., dissenting).

III

Taking a jaundiced view of the constitutional claim, the dissenters would have the District Court dismiss the Supremacy Clause issue, convene a three-judge court and reject the constitutional claim, all of this, apparently, as an exercise of the discretion which the District Court, under *United Mine Workers of America v. Gibbs*, 383 U. S. 715 (1966), is claimed to have over the pendent federal claim. But *Gibbs* was oriented to state law claims pendent to federal claims conferring jurisdiction on the District Court. Pendent jurisdiction over state claims was described as a doctrine of discretion not to be routinely exercised without considering the advantages

of judicial economy, convenience and fairness to litigants. For, "[n]eedless decision of state law should be avoided both as a matter of comity and to promote justice among the parties, by procuring for them a surer-footed reading of applicable law." 383 U. S., at 726 (footnote omitted).¹¹

In light of the dissent's treatment of *Gibbs*, several observations are appropriate. First, it is evident from *Gibbs* that pendent state law claims are not always, or even almost always, to be dismissed and not adjudicated. On the contrary, given advantages of economy and convenience and no unfairness to litigants, *Gibbs* contemplates adjudication of these claims.

Second, it would reasonably follow that other considerations may warrant the adjudication rather than dismissal of pendent state claims. In *Siler v. Louisville & Nashville R. Co.*, 213 U. S. 175 (1909) the Court held that the state issues should be decided first and because these claims were dispositive, federal questions need not be reached:

"Where a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons. In this case we think it much better to decide it with regard to the question of a local nature, involving the construction of the state statute and the authority therein given to the commission to make the order in question, rather than to unnecessarily decide the various constitutional questions appearing in the record." *Id.*, at 193.

¹¹ The Court also cited with approval Judge Magruder's concurrence in *Strachman v. Palmer*, 177 F. 2d 427, 431 (CA1 1949), advising that "[f]ederal courts should not be overeager to hold on to the determination of issues that might be more appropriately left to settlement in state court litigation." 385 U. S., at 726 n. 15.

Siler is not an oddity. The Court has characteristically dealt first with possibly dispositive state law claims pendent to federal constitutional claims. See, e. g., *Louisville & Nashville R. Co. v. Garrett*, 231 U. S. 298, 303-304, 310 (1913); *Ohio Tax Cases*, 232 U. S. 576, 586-587 (1914); *Greene v. Louisville & Interurban R. Co.*, 244 U. S. 499, 503-509 (1917); *Louisville & Nashville R. Co. v. Greene*, 244 U. S. 522, 527 (1917); *Davis v. Wallace*, 257 U. S. 478, 482, 485 (1922); *Chicago G. W. R. Co. v. Kendall*, 266 U. S. 94, 97-98 (1924); *Cincinnati v. Vester*, 281 U. S. 439, 443-449 (1930); *Hillsborough v. Cromwell*, 326 U. S. 620, 629 (1946). The doctrine is not ironclad, see *Sterling v. Constantin*, 287 U. S. 378, 393-394, 396 (1932), but it is recurringly applied,¹² and, at the very least, it presumes the advisability of deciding first the pendent, nonconstitutional issue.

¹² Numerous decisions of this Court have stated the general proposition endorsed in *Siler*—that a federal court properly vested with jurisdiction may pass on the state or local law question without deciding the federal constitutional issues—and have then proceeded to dispose of the case solely on the nonfederal ground. See, e. g., *Hillsborough v. Cromwell*, *supra*, 326 U. S., at 629-630; *Waggoner Estate v. Wichita County*, 273 U. S. 113, 116-119 (1927); *Chicago G. W. R. Co. v. Kendall*, *supra*; *United Gas Co. v. R. R. Comm'n*, 278 U. S. 300, 308 (1929); *Risty v. Chicago, R. I. & Pac. R. Co.*, 270 U. S. 378, 387 (1926). These and other cases illustrate in practice the wisdom of the federal policy of avoiding constitutional adjudication where not absolutely essential to disposition of a case. Other decisions have addressed both the federal and state claims in a random fashion, see, e. g., *Atlantic Coast Line v. Daughton*, 262 U. S. 413, 421-426 (1923); *Southern R. Co. v. Watts*, 260 U. S. 519, 525-531 (1923); but they have generally denied relief on both the federal and nonfederal grounds asserted, the nonfederal claim not being dispositive. *Daughton* and *Watts* were both authored by Mr. Justice Brandeis, who in his celebrated concurring opinion in *Ashwander v. TVA*, 297 U. S. 288, 347 (1936), relied upon *Siler* in summarising the general rule that "if a case can be decided on either of two grounds, one involving a constitutional question, the other a

Gibbs did not cite *Siler* or like cases, nor did it purport to change the ordinary rule that a federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available. The dissent uncritically relies on *Siler* but ignores the preference stated in that case for deciding nonconstitutional claims even though they are pendent and, standing alone, are beyond the jurisdiction of the federal court.²²

question of statutory construction or general law, the Court will decide only the latter."

²² The dissent also relies upon *Hurn v. Oursler*, 289 U.S. 238 (1933), but *Hurn* expressly took account of one aspect of the rule stated in *Siler*: once a federal court acquires jurisdiction of a case by virtue of the federal questions involved, it may omit to decide the federal issues and decide the case on local or state questions alone. With unmistakable clarity, the Court reaffirmed *Siler*:

"The *Siler* and like cases announce the rule broadly, without qualification; and we perceive no sufficient reason for the exception suggested. It is stated in these decisions as a rule of general application, and we hold it to be such" 289 U. S., at 245.

The dissent properly notes *Hurn's* warning that *Siler* does not "permit a federal court to assume jurisdiction of a separate and distinct non-federal cause of action" *Ibid.* However, the *Siler* rule certainly allows the trial court to adjudicate "a case where two distinct grounds in support of a single cause of action are alleged, only one of which presents a federal question" *Id.*, at 246 (emphasis added). We can thus see that here, like in *Hurn*,

"[t]he [complaint] alleges the violation of single right [here the right to nondiscriminatory treatment as to receipt of public assistance]. And it is this violation which constitutes the cause of action. Indeed, the claims of [violation of equal protection and the Social Security Act] so precisely rest upon identical facts as to be little more than the equivalent of different epithets to characterise the same group of circumstances. The primary relief sought is an injunction to put an end to an essentially single wrong, however differently characterised, not to enjoin distinct wrongs constituting the basis for independent causes of action." *Id.*, at 246.

See also *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U. S. 315, 324-325 (1938).

Third, the rationale of *Gibbs* centers upon considerations of comity and the desirability of having a reliable and final determination of the state claim by state courts having more familiarity with the controlling principles and the authority to render a final judgment. These considerations favoring state adjudication are wholly irrelevant where the pendent claim is federal but is itself beyond the jurisdiction of the District Court for failure to satisfy the amount in controversy. In such cases, the federal court's rendition of federal law will be at least as sure-footed and lasting as any judgment from the state courts.¹⁴

The most relevant cases for our purposes, of course, are those decisions such as *King v. Smith*, *Rosado v.*

¹⁴ In a closely analogous context, this Court has recognized the special capability of federal courts to adjudicate pendent federal claims. In *Romero v. International Terminal Operating Co.*, 358 U. S. 354 (1959), an injured Spanish seaman filed suit in federal court claiming damages under the Jones Act and under the general maritime law of the United States for unseaworthiness of the ship, maintenance and cure and negligence. Jurisdiction was invoked under the Jones Act (46 U. S. C. § 688) and under general federal question (28 U. S. C. § 1331) and diversity (28 U. S. C. § 1332) jurisdiction. After expressing its view that petitioner alleged a Jones Act claim substantial enough to confer jurisdiction under that statute, the Court held that his general maritime law claims were not cognizable under 28 U. S. C. § 1331. By no means, however, was this the end of the inquiry.

"[T]he District Court may have jurisdiction of [petitioner's general maritime law claims] 'pendent' to its jurisdiction under the Jones Act. Of course the considerations which call for the exercise of pendent jurisdiction of a state claim related to a pending federal cause of action within the appropriate scope of the doctrine of *Hurn v. Oursler*, 289 U. S. 238, are not the same when, as here, what is involved are related claims based on the federal maritime law. We perceive no barrier to the exercise of 'pendent jurisdiction' in the very limited circumstances before us." 358 U. S., at 380-381 (emphasis added).

Wyman, and Dandridge v. Williams, where the jurisdictional claim arises under the Federal Constitution and the pendent claim, although denominated "statutory," is in reality a constitutional claim arising under the Supremacy Clause. In these cases the Court has characteristically dealt with the "statutory" claim first "because if the appellee's position on this question is correct, there is no occasion to reach the constitutional issues. *Ashwander v. TVA*, 297 U. S. 288, 346-347 (Brandeis, J., concurring); *Rosenberg v. Fleuti*, 374 U. S. 449." *Dandridge v. Williams, supra*, 397 U. S., at 475-476.

In none of these cases did the Court think that with jurisdiction fairly established, a federal court, under *Gibbs*, must nevertheless decide the constitutional issue and avoid the statutory claim if, upon weighing the two claims, the statutory claim is strong and the constitutional claim weak. On the contrary, Mr. Justice Harlan, writing for the Court in *Rosado v. Wyman*, and with the principles of *Gibbs* well in mind, noted that the pendent statutory question was essentially one of federal policy and that the argument for the exercise of pendent jurisdiction was "particularly strong." 397 U. S., at 404. And *Gibbs* itself observed the "special reason for the exercise of pendent jurisdiction" where the Supremacy Clause is implicated: "the federal courts are particularly appropriate bodies for the application of pre-emption principles." 383 U. S., at 729.

The judgment of the Court of Appeals is reversed and the case remanded to that court for further proceedings consistent with this opinion.

So ordered.

SUPREME COURT OF THE UNITED STATES

No. 72-8476

Cynthia Hagans et al.,
Petitioners,

v.
Abe Lavine, Commissioner
of New York State De-
partment of Social
Services, et al.

On Writ of Certiorari to the
United States Court of
Appeals for the Second
Circuit.

[March 25, 1974]

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting.

I join the dissenting opinion of MR. JUSTICE REHNQUIST because I believe he expresses the correct view of the appropriate result when a claim over which a district court has no independent jurisdiction is appended to a constitutional claim that has no hope of success on the merits. A wise exercise of discretion lies at the heart of the doctrine of pendent jurisdiction. *E. g.*, *Rosado v. Wyman*, 397 U. S. 397, 403 (1970); *United Mine Workers of America v. Gibbs*, 383 U. S. 715, 726-727 (1966). Compelling a district court to decide an ancillary claim where the premise for its jurisdiction is a meritless constitutional claim does not impress me as an efficacious performance of a discretionary responsibility.

I write briefly to emphasize my view that the majority has misread the import of the *Gibbs* opinion, *supra*, particularly in the manner in which it links *Gibbs* to *Siler v. Louisville & Nashville R. Co.*, 213 U. S. 175 (1909), and like cases. *Gibbs* involved a state claim that arose out of the same transaction as the federal law claim that conferred federal jurisdiction. The majority

apparently reads *Gibbs* and *Siler* together as mandating decision of the state law claim without regard to the frailty of the federal claim on which federal jurisdiction rests. See *ante*, at 17, 21. In other words, the majority opinion appears to be saying that a federal constitutional claim as marginal as the one at issue here is capable of supporting pendent federal jurisdiction over a state claim and, indeed, that the state claim is to be decided to the exclusion of the federal issue. As I view it, that is a particularly erroneous interpretation of the pendent jurisdiction doctrine. That reading would broaden federal question jurisdiction to encompass matters of state law whenever an imaginative litigant can think up a federal claim, no matter how insubstantial, that is related to the transaction giving rise to the state claim.

This extension of *Gibbs* is quite unnecessary, since we are not confronted with a case where the pendent claim is a matter of state law. The Court's dictum could nevertheless prompt other courts to follow it. In view of this potential mischief, I repeat a quote from *Gibbs* relied on by my Brother REHNQUIST which indicates how far the Court has departed from the rationale of that 1966 precedent:

"[R]ecognition of a federal court's wide latitude to decide ancillary questions of state law does not imply that it must tolerate a litigant's effort to impose upon it what is in effect only a state law case. Once it appears that a state claim constitutes the real body of a case, to which the federal claim is only an appendage, the state claim may fairly be dismissed." 383 U. S., at 727.

The correct reading of *Gibbs*, as a matter of common sense and in light of deeply rooted notions of federalism, is that the federal claim must have more than a glimmer

of merit and must continue to do so at least until substantial judicial resources have been committed to the lawsuit. If either of those conditions is not met, a district court has no business deciding issues of state law. District courts are not expositors of state law when jurisdiction is not based on diversity of citizenship.

CHAPTER I

The first part of the book is devoted to a general survey of the history of the world, from the beginning of time to the present day. The author discusses the various stages of human development, from the earliest forms of life to the modern era. He also examines the different civilizations that have arisen throughout history, and the factors that have influenced their growth and decline. The second part of the book is a detailed account of the events of the last few centuries, from the Renaissance to the present. The author describes the various revolutions, wars, and social movements that have shaped the modern world. He also discusses the current state of the world, and the challenges that it faces.

The third part of the book is a collection of essays on various topics, including the history of science, the history of art, and the history of literature. The author also includes a chapter on the future of the world, in which he discusses the various predictions that have been made about the future, and the factors that will influence the outcome. The book is written in a clear and concise style, and is suitable for both students and general readers. It is a valuable source of information on the history of the world, and the events that have shaped the modern era.

SUPREME COURT OF THE UNITED STATES

No. 72-6476

Cynthia Hagans et al.,

Petitioners,

On Writ of Certiorari to the
United States Court of
Appeals for the Second
Circuit.

Abe Lavine, Commissioner
of New York State De-
partment of Social
Services, et al.

[March 25, 1974]

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE POWELL join, dissenting.

The Court's decision in this case resolves a legal question and is necessarily and properly cast in legal terms. According to the Court, a federal district court, having acquired jurisdiction over a "not wholly insubstantial" federal claim, has power to decide other related claims which lack an independent jurisdictional basis. Applying this analysis to the present case, the Court finds the equal protection claim pleaded by petitioners sufficient to satisfy this somewhat hazy definition of "substantiality" and appears to approve the District Court's exercise of pendent jurisdiction over a claim alleging conflict between state and federal welfare regulations. But since we have been admonished that we may not shut our eyes as judges to what we know as men, the practical as well as the legal consequences of this decision should be squarely faced.

In the wake of *King v. Smith*, 392 U. S. 309 (1968), and *Rosado v. Wyman*, 397 U. S. 397 (1970), the lower federal courts have been confronted by a massive influx of cases challenging state welfare regulations. The principal claim of plaintiffs in the typical case is that the state

regulation conflicts with governing federal regulations and is invalid under the Supremacy Clause of the United States Constitution. This allegation presents a federal claim sufficient to satisfy the first jurisdictional requirement of 28 U. S. C. § 1331,¹ the so-called "federal question" jurisdictional statute, but many plaintiffs find the statute's second requirement, that the matter in controversy exceed the sum of \$10,000, impossible to meet. Normally therefore these cases would be left, as Congress surely understood when it imposed this jurisdictional limitation, to state courts likewise charged with enforcing the United States Constitution.

To avoid this natural disposition, however, plaintiffs in these cases have turned to 28 U. S. C. § 1343, a more narrowly drawn federal jurisdictional statute requiring no minimum jurisdictional amount. The provision of 28 U. S. C. § 1343 relevant to this case reads:

"The District Court shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

"(3) To redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States"

This Court, however, has never held, and does not hold now, that the Supremacy Clause of the Constitution

¹ The relevant provision of 28 U. S. C. § 1331 reads as follows:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

The jurisdictional amount was raised from \$3,000 to \$10,000 in 1958.

itself provides a basis for jurisdiction under this section. The Court escapes the need for such a decision by granting the federal courts power to hear the Supremacy Clause claim under a theory of pendent jurisdiction. Finding that plaintiffs here have pleaded an equal protection claim sufficiently substantial to satisfy the requirements of 28 U. S. C. § 1343, the Court seems to suggest that consideration of the Supremacy Clause claim may follow as a matter of course. Since I do not believe that the equal protection claim was sufficient to establish jurisdiction under § 1343, or that the doctrine of pendent jurisdiction was appropriately invoked in this case, I dissent.

I

The history of pendent jurisdiction in this Court is long and complex. Its roots go back to *Osborn v. Bank of the United States*, 22 U. S. (9 Wheat.) 738 (1824), where the Court said that the jurisdiction of the federal courts extended not only to federal issues themselves but also to nonfederal issues essential to the settlement of the federal claim. No subsequent decision has cast any doubt upon the wisdom of Chief Justice Marshall's expositions in that case, since a different result would have forced substantial federal cases into state courts for adjudication simply because they involved nonfederal issues as well as federal ones.² The doctrine was

² "Under this construction, the judicial power of the Union extends effectively and beneficially to that most important class of cases, which depend on the character of the cause. On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the constitution, but to those parts of cases only which present the particular question involving the construction of the constitution or the law. We say it never can be extended to the whole case, because, if the circumstance that other points are involved in it, shall disable Congress from authorizing the Courts of the Union to take jurisdiction of the original cause, it equally disables Congress from authorizing those Courts to take jurisdiction of

expanded in *Siler v. Louisville and Nashville R. Co.*, 213 U. S. 175 (1909), where the Court upheld the power of a district court, having founded its jurisdiction upon federal constitutional claims, to bypass the constitutional questions and to decide an issue of local law. The Court said that the lower court "had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the parties raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only."^a But the Court at the same time cautioned: "Of course, the Federal question must not be merely colorable or fraudulently set up for the mere purpose of endeavoring to give the court jurisdiction."^b

the whole cause, on an appeal, and thus will be restricted to a single question in that cause; and words obviously intended to secure to those who claim rights under the constitution, laws, or treaties of the United States, a trial in the federal Courts, will be restricted to the insecure remedy of an appeal upon an insulated point, after it has received that shape which may be given to it by another tribunal, into which he is forced against his will." 22 U. S. (9 Wheat.), at 822-823.

^a 213 U. S., at 191.

^b 213 U. S., at 191-192. In *Siler* the Court specifically noted that the constitutional claim was not fraudulently pleaded to confer jurisdiction over the pendent claim.

The Court today, by its heavy emphasis on deciding state issues in preference to constitutional ones, *ante*, p. 17-19, seems to imply that this doctrine should be controlling even when a constitutional claim is pleaded "for the mere purpose of endeavoring to give the court jurisdiction." I cannot agree. The numerous cases cited in the Court's opinion stand for the long-recognized and sensible policy that cases should be decided on nonconstitutional grounds where possible; but they do not stand for the proposition that claims which would be otherwise dismissed under the principles discussed in *United Mine Workers of America v. Gibbs*, 383 U. S. 715 (1966), should be heard simply to avoid the constitutional claim which conferred jurisdiction in the first place. See n. 11, *infra*. In such cases the competing and equally important policy of safeguard-

The Court returned to the question of pendent jurisdiction in *Hurn v. Oursler*, 289 U. S. 238 (1933), and *Levering & Garrigues Co. v. Morrin*, 289 U. S. 103 (1933). The Court in both cases agreed that a substantial federal question was necessary to confer initial jurisdiction on the District Court,¹ a test that must be met whether or not pendent jurisdiction is involved; and then in *Hurn* further attempted to define the necessary relationship between the pendent claim and the claim conferring jurisdiction. According to the Court, a lower federal court could exercise pendent jurisdiction over a separate *ground* alleged in support of a single cause of action, but not over a separate cause of action itself.²

ing the limited jurisdiction of the federal courts is entitled to more weight than the Court appears to give it.

¹ The Court in *Levering*, *supra*, stated:

"Whether an objection that a bill or a complaint fails to state a case under a federal statute raises a question of jurisdiction or of merits is to be determined by the application of a well settled rule. If the bill or the complaint sets forth a substantial claim, a case is presented within the federal jurisdiction, however the court, upon consideration, may decide as to the legal sufficiency of the facts alleged to support the claim. But jurisdiction, as distinguished from merits, is wanting where the claim set forth in the pleading is plainly unsubstantial. The cases have stated the rule in a variety of ways, but all to that effect. . . . And the federal question averred may be plainly unsubstantial either because obviously without merit, or 'because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.'" 289 U. S., at 105-106.

² *Hurn v. Oursler* 289 U. S., at 245-246:

"But the rule does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct non-federal cause of action because it is joined in the same complaint with a federal cause of action. The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case

The Court's most recent extensive treatment of the subject occurred in *United Mine Workers of America v. Gibbs*, 383 U. S. 715 (1966). Because *Hurn* had spoken in terms of "causes of action," a term which was superseded by the adoption of the Federal Rules of Civil Procedure, *Gibbs* redefined the necessary relation of the federal and nonfederal claims in more understandable terms. Restating the substantiality test in pretty much the language of the earlier cases, the Court then continued:

"The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole." 383 U. S., at 725 (footnote omitted).

This language served to clarify jurisdictional questions which had proved troublesome after *Hurn v. Oursler*. But, importantly, the decision then went on to emphasize that power to hear claims lacking an independent jurisdictional basis should not be exercised indiscriminately. The Court reiterated "that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right," 383 U. S., at 726, and urged that the district courts exercise caution

where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal ground; in the latter it may not do so upon the non-federal cause of action." (Emphasis in original.)

not to abuse that discretion. For example, the Court suggested that

"if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." 383 U. S., at 726 (footnote omitted).

Furthermore, the Court stressed that the relative importance of the claims should be considered:

"Similarly, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals." 383 U. S., at 726-727.

Although the Court's language in *Gibbs* necessarily discussed the relationship between federal and state claims, much of the opinion's rationale is applicable when pendent jurisdiction is sought over federal claims lacking an independent jurisdictional basis.¹ Of course, a decision to deny pendent jurisdiction on the ground that state courts should consider questions of state law naturally involves issues relevant to the question of abstention, a consideration not especially applicable when the pendent claim primarily involves questions of

¹ The Court in *Gibbs* also stated:

"[R]ecognition of a federal court's wide latitude to decide ancillary questions of state law does not imply that it must tolerate a litigant's effort to impose upon it what is in effect only a state law case. Once it appears that a state claim constitutes the real body of a case, to which the federal claim is only an appendage, the state claim may fairly be dismissed."

I also see no reason why federal courts should be required to "tolerate" efforts to impose upon them federal cases which Congress has chosen to leave to the state courts.

federal law. But the presence of federal questions should not induce federal courts to expand their proper jurisdiction. As previously noted, Congress, by requiring a minimum dollar amount for federal question jurisdiction, made a legislative decision to leave certain claims to state courts. Considerations of convenience and judicial economy may justify hearing those claims when genuine federal business, as contrasted to weak claims intended merely to secure jurisdiction, is before the federal court, but these considerations should be subordinated to considerations of federalism when the claims without independent jurisdiction constitute "the real body" of the case. In this situation the lower courts should remember that federalism embodies

"a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U. S. 37, 44 (1971).

The majority rejects this analysis, seemingly finding that state courts' greater familiarity with state law is the only reason for declining pendent jurisdiction under *Gibbs*. But Congress left to state courts not only those claims involving state law but also those claims involving federal law which it felt did not merit the time of federal courts. This Court now says that federal courts should hear those cases anyway since they can render "at least as sure footed" an interpretation of federal law and are "particularly appropriate bodies" to do so. This opinion, while it undoubtedly reflects

the view of this Court, does not reflect with equal accuracy the purpose of Congress.

In *Rosado v. Wyman*, 397 U. S. 397 (1970), heavily relied upon by the Court to support its position, there was no intimation that the constitutional claim was a weak one pleaded for the purpose of securing federal jurisdiction over a stronger claim. Rather the constitutional claim proved moot. This Court plainly stated:

"Unlike substantiality, which is apparent at the outset, mootness, frequently a matter beyond the control of the parties, may not occur until after substantial time and energy have been expended toward the resolution of a dispute that plaintiffs were entitled to bring in federal court." 397 U. S., at 404.

Thus *Rosado* does not in any way settle the issue before the Court today. Its holding offers no aid in resolving the real and practical issues that the Court confronts in this case.

The *Gibbs* decision must be understood in its separate parts. First, the Court held that jurisdiction could not attach unless the claim for which jurisdiction was asserted met the requirement of substantiality and unless the pendent claim was sufficiently related to the jurisdictional claim to constitute a single case under the Constitution. Second, the Court admonished that this jurisdiction, even if found to exist, should be exercised judiciously. The relatively permissive standards applied to the issue of whether the Court *could* consider a dependent claim were not to guide the ultimate decision of whether the Court *should* consider the pendent claim. Only where "considerations of judicial economy, convenience, and fairness to litigants" were served and where the pendent claim did not predominate in

scope or worth over the judicial claim, was the doctrine of pendent jurisdiction to be applied. While I am convinced that the District Court lacked jurisdiction over an equal protection claim as thin as this one, even if I am wrong on that point it seems clear to me that its decision to exercise pendent jurisdiction over the Supremacy Clause claim was not based on the discretionary considerations outlined in *Gibbs, supra*.

II

The District Court simply found the equal protection claim in this case to be "substantial" and proceeded without further discussion to the statutory claim. The Court of Appeals, reversing the determination of the District Court, found the claim to be insubstantial and therefore had no need to go further. This Court merely disagrees on the question of substantiality, reinstating the District Court's jurisdiction. Unfortunately, this process of analysis seems to me to be wrong both in its treatment of the jurisdictional question and in its failure to treat the discretionary aspects of pendent jurisdiction.

Whatever legal terminology is applied to the equal protection claim of the plaintiffs in this case, the one clear fact is that the claim is not very good. In brief, petitioners, who are recipients of public assistance under the Aid to Families with Dependent Children Program, all received funds from New York, over and above their usual monthly grants, to prevent eviction from their places of lodging for nonpayment of rent. The State, pursuant to a provision of the New York Code of Rules and Regulations challenged in the District Court, sought to recover these unusual expenditures by making deductions over the next succeeding months from petitioners' normal monthly grants. In their complaint petitioners

contended that the New York recoupment procedure deprived them of equal protection of the laws.*

One searches in vain, either in petitioners' brief or in the opinions of the District Court or this Court, for any reason why this claim meets even a minimal test of substantiality. It would seem extraordinary if, having paid petitioners more than their normal monthly entitlement in order to meet an emergency situation, the State had not sought to recoup the payments over a period of time. The District Court, finding the claim substantial, cited *Bradford v. Jures*, 331 F. Supp. 167 (Ore. 1971), a decision by a three-judge district court which found jurisdiction on a similar constitutional claim and then decided the case on statutory grounds. In *Bradford*, however, the Court simply stated that it had jurisdiction under 28 U. S. C. § 1343 (3) without further discussion.*

The opinion of this Court sheds no more light than did the opinion of the District Court. The Court simply states:

"This reasoning with respect to the rationality of the regulation and its propriety under the Equal Protection Clause may ultimately prove correct, but it is not immediately obvious from the decided cases

* The portion of the petitioners' complaint setting forth its equal protection claim states in full:

"Said regulation irrationally and invidiously discriminates against plaintiff victims of eviction. No basis exists in law or fact, consistent with the purposes of the Social Security Act, for reducing the level of payments to plaintiffs who are then forced to live far below the subsistence levels provided to all other persons. Said regulation applies a wholly different standard in determining the grant levels of plaintiffs than the income resource and exemptions from levy standard, applicable to all other persons in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution."

* 331 F. Supp., at 167.

or so 'very plain' under the Equal Protection Clause." Ante, at 13.

But cases such as *Dandridge v. Williams*, 397 U. S. 471 (1970), have largely discredited attacks on legislative decisions about the apportionment of limited state welfare funds. At least where the Court has not found a penalty based on race or considerations such as interstate travel, the legislative judgment is upheld whenever a "conceivable rational basis" exists. Although *Dandridge* did not "suspend the operation of the Equal Protection Clause" in this area, it assuredly makes this particular claim a marginal one.¹⁰

I therefore cannot agree that the equal protection claim pleaded here was sufficient to confer jurisdiction on the District Court. Even assuming that the lower court may refer only to the pleadings in making its determination on the question of jurisdiction, the analysis need not be made, as the majority seems to imply, in a legal vacuum. To say that previous decisions have not foreclosed a question unless a prior case "specifically deal[s]" with the same regulation neglects the second branch of the test enunciated in *Levering, supra*, and repeated in later cases, that a claim is insubstantial because "obviously

¹⁰ The Court in *Dandridge* stated:

"Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration, *Goldberg v. Kelly*, ante, p. 254. But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients. Cf. *Steward Mach. Co. v. Davis*, 301 U. S. 548, 584-585; *Helvering v. Davis*, 301 U. S. 619, 644." 397 U. S., at 487.

without merit." 289 U. S., at 105. Under today's rationale it appears sufficient for jurisdiction that a plaintiff is able to plead his claim with a straight face. But a district court should be able to dismiss for want of jurisdiction any claim that plainly carries no hope of success on the merits. This lack of promise in turn could be evident from recent decisions of this Court rejecting claims with a similar thesis or laying down rules which would clearly require dismissal on the merits.

Assuming, however, that the District Court here did have jurisdiction, it seems clear to me that under *Gibbs* the equal protection claim should not support the Supremacy Clause claim also asserted by petitioners. The test for exercising discretion must be a practical one, involving the type of judgments that a reasonable lawyer, evaluating the respective strengths and weaknesses of his case, might undertake. In this case it is highly improbable that a lawyer familiar with this Court's cases would place much faith in the success of his equal protection claim. In fact, examination of the complaint itself shows that substantially more attention was paid to the Supremacy Clause claim than to the claims under the Fourteenth Amendment. At the very least, the District Court, before it chose to exercise pendent jurisdiction, should have made an identifiable determination that the Equal Protection Clause was not simply asserted for the purpose of giving the Court jurisdiction over the heart of the plaintiffs' case. To my mind this seems to be a classic case of the statutory tail wagging the constitutional dog.

III

Thus, even if the Court of Appeals may have erroneously resolved the question of jurisdiction, the result it reached was correct in terms of the wise exercise of jurisdiction. Whether the equal protection claim pleaded in

this case meets the threshold of substantiality for jurisdiction in the federal courts, the claim surely should not convince a district court that its main purpose was anything other than to secure jurisdiction for the more promising Supremacy Clause claim. Presented with this situation, the District Court should have declined to exercise pendent jurisdiction over the Supremacy Clause claim and referred the equal protection claim to a three-judge court.¹¹ Since its failure to do so seems to me an abuse of discretion under *Gibbs*, I dissent.

¹¹ Petitioners originally sought to convene a three-judge court to consider their constitutional claims but later withdrew that request. Pursuant to a stipulation between the parties, the case was then tried before a single judge on the issue of the claimed statutory conflict only. *Goosby v. Osser*, 409 U. S. 512 (1973), specifies that a three-judge court must be convened to hear constitutional questions within its jurisdiction if they are "substantial." It is true, of course, that federal courts commonly avoid deciding constitutional questions when alternate grounds for decision are available. See, e. g., *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 346-347 (Brandeis, J., concurring). But application of that principle to cases in which the constitutional claim is pleaded primarily to confer jurisdiction over a pendent claim would lead to circular reasoning. Under that theory a claim for which Congress provided no jurisdiction and which a single judge determined to be improperly brought into federal court would become a preferred ground for decision simply because the court wished to avoid the claim over which Congress granted jurisdiction in the first place. To turn to the pendent claim when pendent jurisdiction is properly assumed under *Gibbs* may be appropriate, but the presence of a constitutional claim which might therefore be avoided should not itself be an independent basis for hearing the pendent claim.

In rare cases, of course, a three-judge court may disagree with the single judge's view that a constitutional claim lacks merit and resolve the constitutional issue in the plaintiff's favor. At that point, the plaintiff will have his relief, and the case need go no further. Concededly, a constitutional decision will have been rendered when a statutory decision might have been possible, but that cost, in the few cases where it is likely to arise, seems less expensive than the cost of allowing federal jurisdiction to be unnecessarily expanded.

